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The arguments upon the constitutionality of the income tax law, before the United States Supreme Court, are concluded and the question is now squarely presented to that court for determination. The interest in the argument has been chiefly in the addresses of the leading counsel who stated the reason for and against the validity of the law. These were Attorney-General Olney, Mr. James C. Carter, ex-Senator Edmunds and Mr. Joseph H. Choate, the two former in support of the law and the two last mentioned against it. We find in *Bradstreet's* March 16, an excellent report of the debate. Senator Edmunds argued that at the time the constitution was adopted the income taxes were included within the class of direct taxes, and, touching the inequality of the law, he asserted that 95 per cent. of the revenue to be derived from income taxes would be paid by less than 2 per cent. of the male voters of the United States.

Attorney-General Olney, who followed, said that the constitutional contention of the plaintiffs might be summarized in two points —one that the income tax was a direct tax and must be based upon the rule of apportionment; the other that it violated the provisions of the constitution with regard to uniformity. He assumed that the point had been settled by adjudication that the income tax was not a direct tax. He argued that the meaning of the word "uniform," as applied to the collection of imposts, excises, etc., had a territorial application, and no other. The power to tax was, he said, for practical use, and was necessarily to be adapted to the practical conditions of human life. Absolute equality of taxation was impossible. In distinguishing between persons with incomes over $4,000 and those with incomes under that amount congress sought to adjust the load of taxation to the shoulders of the community in the manner that would make it most easily borne and most lightly felt. When the income tax law made a special class of business corporations and taxed their incomes at a higher rate than that applied to the incomes of persons not incorporated, it but recognized existing social facts and conditions which it would be but folly to ignore.

Mr. Carter, who followed on the other side, said that the proper rule for taxation was that it should be laid with regard to the tax payer's ability to pay the tax; that that ability was not to be determined by the amount of property he had but by how much he had to spend and that if in laying the tax the legislature should make mistakes, the remedy did not lie in an appeal to the judiciary. Mr. Carter also assumed that the question whether an income tax was a direct tax was not open to discussion. The provisions regarding uniformity of taxation referred, he said, to territorial uniformity. Taxing some men because they were rich and exempting others because they were poor came, Mr. Carter argued, within the legitimate exercise of the taxing power by congress. That body, he argued, had the right and power to determine classes for the purpose of taxation, and its power was transcended only when, having fixed these classes, it undertook to take any one out of his class and exempt him from the operation of the law relating to it. The exceptions to the operation of the law covering savings banks, mutual insurance companies, and partnerships, as discriminated from stock corporations, were, he said, all made by congress upon grounds of public policy, and were not to be attacked. Referring to the contention advanced on the argument, that congress had not the power to tax State and municipal bonds, he said that this was a question upon which no decision had been made, and he asked if the national government was to be precluded from doing to the securities of any State what all the other States of the Union might do.

The argument against the tax was concluded by Mr. Choate, who argued that the tax on real estate and rents and incomes therefrom was a direct tax, the tax on rent being in effect a tax on land. The meaning of the word uniform in the constitution, he argued, was that in the levying of imposts, duties and excises wherever done there should be equal and exact relations between the government and each and every citizen of the United

States. The exemption of incomes of $4,000 and less Mr. Choate stigmatized as a deliberate strike by those who voted for it at those parts of the United States where money had accumulated. In like manner he criticised the exemption of savings banks, mutual insurance companies and other classes of corporations. His final argument was to the effect that State and municipal bonds were exempt from the operation of the law upon the same theory as that on which national bonds were exempt from State taxation. Mr. Choate's summing up was impressive. He declared that no member of the court would live long enough to hear a case involving a question more vital than that before it, which affects so seriously the people of the United States who rely upon the guarantees of the constitution which the fathers made and under which so many people have lived until this time. It is said by those who heard it that it is doubtful whether the argument for and against the law could have been more effectively presented. An attentive reader of the addresses, will undoubtedly be impressed by the fact that the arguments against the constitutionality of the law have been less weighty than those against its policy.

NOTES OF RECENT DECISIONS.

NEGOTIABLE INSTRUMENT — WRONGFUL TRANSFER—ACTION FOR DAMAGES.—In Nashville Lumber Co. v. Fourth National Bank, 29 S. W. Rep. 368, decided by the Supreme Court of Tennessee, it was held that where the holder of a note having on it the unauthorized indorsement of a corporation, with knowledge of such infirmity transfers it to an innocent purchaser, as such transfer renders the corporation liable, an action for damages will lie by the corporation against the original holder for the wrongful transfer. The court said in part:

We have been cited to no case directly in point, and perhaps there is none to be found, though we think the principles involved have been settled, upon a somewhat different state of facts, in several cases. The case of Railway Co. v. Kneeland (N. Y. App.), 24 N. E. Rep. 381, is relied on. That was an action for damages by the corporation against its directors (1) for illegally voting a salary to the president of the company; and (2) authorizing the issuance of negotiable notes therefor, which went into the hands of an innocent holder. The court held that no liability attached to the directors for voting the salary, for that, being illegal, created no liability, but that such of the directors as voted to issue the negotiable notes were liable, because such notes did create a liability, when they came into the hands of an innocent holder. The court said: "We think the case relating to this subject rests upon the principle that a person who fraudulently places in circulation the negotiable instrument of another, whether made by him or his apparent authority, and thereby renders him liable to pay the same to a *bona fide* purchaser, is guilty of a tort, and liable for the value of the note. The essential injury, common to all cases of this character, is the fraudulent imposition of liability. Hence, there should be a common remedy, whether it is called an action for conversion, or in the nature of a conversion, or a special action on the case." The case proceeds: "In what respect do the wrongful acts of the directors who negotiated the notes differ from these cases which were held to authorize an action for conversion, or an action in the nature of conversion, of negotiable paper? Is there not in each the same presumption of damages springing from a liability wrongfully imposed? Were not all of these actions founded on the fact that the maker, real or apparent, of a negotiable instrument, had, through the wrongful acts of another, become chargeable, so that he could be compelled to pay such instrument, which would not have ripened into a valid obligation against him, but for such wrongful act?" There are numerous cases holding a party liable for the unauthorized conversion of negotiable paper. In Decker v. Matthews, 12 N. Y. 313, it is said, in substance, that the *gravamen* of such action is the wrongful act of the defendant, in causing a note, without value, except to *bona fide* holder, to become valuable, by a sale thereof to such a purchaser as could enforce it against the plaintiff, and the right of action accrues as soon as the transfer is made, and before payment enforced. In Thayer v. Manley, 73 N. Y. 305, defendant fraudulently induced plaintiff to execute and deliver to him certain notes; but, before they matured, plaintiff demanded their return to him, which was refused. It was held that as defendant had it in his power, when suit began, to dispose of the notes to a *bona fide* holder, in whose hands they would have been valid, plaintiff was entitled to recover their full value, which might be discharged by a return of the notes. In Farnham v. Benedict, 107 N. Y. 159, 13 N. E. Rep. 784, defendant, being in possession, without title, of certain town bonds that had been fraudulently issued, through his procurement, and which were void in fact, but apparently valid, sold them to *bona fide* purchasers, and thus rendered them valid and binding on the town, which was compelled to pay them. It was held that he was liable to the town for the amount of the bonds, and that an action lay, either in the nature of trover, for the face of the bonds, or for money had and received, for the money realized therefrom, according to the rule laid down in Comstock v. Hier, 73 N. Y. 269. In Betz v. Daily, 3 N. Y. St. Rep. 309, it was held that in an action by a partner against his copartner and others for fraudulently making notes in the name of the firm, and negotiating them to innocent holders, the cause of action was complete when the wrong was done, and that payment of the notes was not essential to recovery, the court holding that the injury was done when the notes were first negotiated. In Town of Ontario v. Hill, 33 Hun, 250, the defendants were held liable for wrongfully issuing the negotiable notes of a town, some of which had gone into the hands of innocent holders. This case was afterwards reversed, but not on this point (see 99 N. Y. 324, 1 N. E. Rep. 887; see, also,

Hass v. Sackett [Minn.], 41 N. W. Rep. 237, and cases there cited).

In the case at bar, it is proper to remember that the Nashville bank had title to this paper, as against the maker, and, so far as the maker is concerned, its transfer was in no sense a conversion of the paper; but it did not have the legal right to the plaintiff's indorsement, nor any right or power to pass it to another. Nevertheless, the transfer put the legal title the paper, and its indorsement, in the Louisville bank, which had no notice of the infirmity of the paper, and hence the plaintiff could not defend against its suit. It must be borne in mind that the case at bar is not the case of an indorser who has received value for his name and credit, and who then seeks to avoid the contract, in which case he must refund the money, or be denied relief; and hence many of the cases cited for the bank do not apply, and need not be commented on. The case of Freeman v. Venner, 120 Mass. 424, is specially relied on by defendant bank; but in that case the plaintiff, upon his own showing, could not impeach the defendant's title to the note, nor his right to transfer that title to another, and it is not, therefore, analogous to this. The case of Solinger v. Earle, 82 N. Y. 396-400, is also relied on; but in that case the party who sought damages for the unauthorized use of his note was denied relief because he was guilty of a legal wrong, in putting the note into existence, and the court repelled him because of this wrong. In the case at bar, however, the plaintiff company did not put its indorsement into circulation, but it was made without consideration, for accommodation, and without authority, by its secretary, and without knowledge of the directory. The case, as presented to us by the declaration and demurrer, is that of a holder of paper, upon which it cannot legally recover, against an indorser, transferring that paper to a third person, so as to enable such person to collect the paper from the indorser, not for the transferree's benefit, and in due course of trade, but for the use and benefit of the transferring bank, and thus indirectly holding the indorser liable, when the transferring bank could not regularly so hold it. The principle would be the same if the bank at Nashville had held the note of the plaintiff on which it was maker, and which, for any reason, was void and had, before maturity, transferred it to the Louisville bank, in order to enable it to collect it for account of the Nashville bank. In each case it is an appropriation to its own use, by forms of law, of the credit and money of the indorser or maker, to which the Nashville bank had no right; and we think the case falls within the reason of the cases here cited.

CRIMINAL PRACTICE—EXPERT WITNESS—COMPENSATION.—The Supreme Court of Arkansas in Flinn v. Prairie County, 29 S. W. Rep. 459, decides that an expert who testifies for the State in a criminal case cannot demand compensation in addition to the usual fees allowed witnesses, provided he is not compelled to make any preliminary examination or preparation, and is not compelled to attend and listen to the testimony. The court says:

> The only question for us to determine is whether an expert who testifies as such on behalf of the State in a criminal case may demand compensation in addition to the usual fees allowed witnesses in such cases. We have no statute authorizing the payment of extra compensation to experts. Our statute makes no distinction between different classes of witnesses. In the absence of a statute regulating it, the question is one of some doubt, for the decisions of the courts of the different States upon it are very conflicting. "In this country," says Prof. Rogers in his work on Expert Testimony, "the cases are nearly balanced, and the question must be regarded as still an open one, although the weight of authority rather inclines to the theory that the expert may be required to answer without additional compensation." Rog. Expert Test. (2 Ed.) 425. In a recent case decided by the Colorado Court of Appeals, the rule was stated as follows: "The professional witness, in the discharge of his duty as a good citizen, is, like any other person, whether he be laborer, merchant, broker, manufacturer, or banker, compellable to attend in obedience to process, and to testify as to what he may know, whether it be observed facts or accumulated knowledge, acquired by study and experience." Commissioners v. Lee, 3 Colo. App. 177, 32 Pac. Rep. 841. This view is supported by the following cases: *Ex parte* Dement, 53 Ala. 389; Summers v. State, 5 Tex. App. 374; State v. Teipner, 36 Minn. 535, 32 N. W. Rep. 678; Allegheny Co. v. Watt, 3 Pa. St. 462; Northampton Co. v. Innes, 26 Pa. St. 156; Israel v. State, 8 Ind. 467.
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> The question has never been directly determined by this court, but there are *dicta* in some of the cases which seem to support the theory that the expert cannot lawfully demand of the county extra compensation. In one case it was held that an attorney may be compelled, without compensation, to defend persons charged with crime, who are unable to employ counsel. Arkansas Co. v. Freeman, 31 Ark. 266. In another case the court in discussing the power of a coroner while holding an inquest, said, "He may summon a physician to testify, and compel him to swear to his opinion on a superficial view of the body." St. Francis Co. v. Cummings, 55 Ark. 421, 18 S. W. Rep. 461. All persons who, by study or practice in an occupation or profession, have become skilled therein, and possessed of knowledge peculiar to the same, are, in law, called "experts." There is not an art, trade, profession, or vocation that does not have them. It is evident, therefore, that, if all such witnesses are entitled to extra compensation when they testify as experts, the costs of criminal trials, in cases where such testimony is needed, will be much increased. In the case at bar the witness attended six days, and claims $150. If the legislature had intended that such a large class of witnesses should receive additional compensation, it seems reasonable to believe that some provision would have been made for it in the statute. After considering the matter, we have concluded that under our statute a physician who testifies as an expert in a criminal case is not entitled to extra compensation from the county. It is the duty of every citizen to assist, within reasonable limits, in enforcing the criminal law of the State; and it is not unreasonable that he should be required, on behalf of the State, to give such information as he may possess towards the elucidation of any question arising in a criminal trial, whether that information be in the nature of expert evidence or not. He cannot be required to make any examination or preliminary preparation, nor can he be compelled to attend the trial, and listen to the testimony, that he may be better enabled to give his opinion as an expert. For any service of this kind he may demand extra compensation. But such information as he already possesses, that is per-

tinent to the issue, he can be made to give, whether such information is peculiar to his trade or profession, or not.

INSURANCE—INTERSTATE COMMERCE—FOREIGN CORPORATION.—The right of a State to prescribe conditions for the transactions of an insurance business within its borders by a foreign corporation was long ago upheld by the Supreme Court of the United States. In the recent case of Hooper v. People of State of California, 15 S. C. Rep. 206, that court considered the power to suppress a substantial evasion of such right. The question involved the interpretation of section 439 of the Penal Code of California which reads as follows: "Every person who in this State procures or agrees to procure any insurance for a resident of this State from any insurance company not incorporated under the laws of this State, unless such company or its agent has filed the bond required by the laws of this State relative to insurance, is guilty of a misdemeanor." It appeared that insurance brokers, having their principal place of business in the city of New York, had also a place of business, with a resident agent in charge, in the State of California. A resident of California applied to said agent for marine insurance, which fact the latter communicated to his principals in New York, who placed the insurance in a foreign company which had not complied with the insurance laws of California, and forwarded the policy to defendant—the resident agent as aforesaid—who delivered the policy to the applicant and collected the premium. The court affirms a conviction of such resident agent under the section above recited. Mr. Justice White who writes the opinion of the court, first refers to the case of Paul v. Virginia, 8 Wall. 168, holding that the business of insurance does not constitute interstate commerce within the meaning of the federal constitution. It is held that there is no distinction between marine insurance and fire insurance, and that the reasoning of Paul v. Virginia, and other cases that have followed it, is controlling on such point. The court then says:

It is claimed, however, that, irrespective of this clause (the interstate commerce clause of the federal constitution), the conviction here was illegal—first, because the statute is by its terms invalid, in that it undertakes to forbid the procurement of a contract outside of the State; and, secondly, because the evidence shows that the contract was, in fact, entered into without the Territory of California. The language of the statute is not fairly open to this construction. It punishes "every person who, in this State, procures, or agrees to procure, for a resident of this State any insurance," etc. The words "who in this State" cannot be read out of the law in order to nullify it under the constitution.

It is urged that the words, "every person who agrees to procure for a resident of this State," are inconsistent with the preceding language, "who in this State procures," etc. The argument is this: The act punished is procuring for a resident. In order to procure for another, the procurer must be agent of such other; hence the contract of insurance was procured by the agent of the insured, and not by the agent of the foreign company; and, inasmuch as the foreign company was not, and under the law could not be technically, within the State for the purpose of giving its assent to the contract, the insurance must have been procured without the State. The fallacy here is ingenious, but it is easily exposed. The elementary rule is that every reasonable construction must be resorted to in order to save a statute from unconstitutionality. Parsons v. Bedford, 3 Pet. 433; U. S. v. Coombs, 12 Pet. 72; Brewer's Lessee v. Blougher, 14 Pet. 178; Supervisors v. Brogden, 112 U. S. 261, 5 Sup. Ct. Rep. 125; Presser v. Illinois, 116 U. S. 252, 6 Sup. Ct. Rep. 580.

The admission that the insurance was procured for the resident from a foreign company which had no agent in the State does not exclude the possibility of its having been procured within the State. If it were obtained for the resident by a broker who was himself a resident, this would be a procuring within the State, and be covered by the statute.

The business of a broker is to serve as a connecting link between the party who is to be insured and the party who is to do the insuring—to bring about "the meeting of their minds" which is necessary to the consummation of the contract. In the discharge of his business he is the representative of both parties to a certain extent. How v. Insurance Co., 80 N. Y. 32; Insurance Co. v. Young, 111 Mass. 537; Insurance Co. v. Reynolds, 36 Mich. 502.

Domat thus defines his functions: "The engagement of a broker is like to that of a proxy, a factor or other agent, but with this difference: that the broker, being employed by persons who have opposite interests to manage, he is, as it were, agent both for the one and the other, to negotiate the commerce and affairs in which he concerns himself. Thus his engagement is twofold, and consists in being faithful to all the parties in the execution of what every one of them intrusts him with. And his power is not to treat, but to explain the intentions of both parties, and to negotiate in such a manner as to put those who employ him in a condition to treat together personally." 1 Dom., Strahan's Translation, bk. 1, tit. 17, Sec. 1.

Story says this statement of the functions of a broker is 'a full and exact description according to the sense of our law.' Story, Ag., 9th Ed., p. 31, note 3.

"If the contention of the plaintiff in error were admitted, the established authority of the State to prevent a foreign corporation from carrying on business within its limits, either absolutely or except upon certain conditions, would be destroyed. It would be only necessary for such a corporation to have an understanding with a resident that in the effecting of contracts between itself and other residents of the State he should be considered the agent of the in-

sured persons, and not of the company. This would make the exercise of a substantial and valuable power by a State government depend, not on the actual facts of the transactions over which it lawfully seeks to extend its control, but upon the disposition of a corporation to resort to a mere subterfuge in order to evade obligations properly imposed upon it. Public policy forbids a construction of the law which leads to such a result, unless logically unavoidable.

"The facts found here enforce the correctness of these views, and illustrate the evil which the statute was doubtless intended to prevent.

Mr. Justice Harlan, with whom concur Mr. Justice Brewer and Mr. Justice Jackson, dissents. The reasoning of the dissenting opinion is in effect that the upholding of the provisions of the California Penal Code amounts to an unconstitutional interference with the personal liberty and the right of citizens of California to engage in a legitimate business.

FEDERAL OFFENSE — LOTTERIES — USE OF MAILS—INJUNCTION AGAINST POSTMASTER.—U. S. Revised Stat. § 396, makes it the duty of the postmaster general to instruct all persons in the postal service with reference to their duties, etc., Sections 3929 and 4041 provide that the postmaster general may, "upon evidence satisfactory to him" that any person is conducting a lottery, etc., or any scheme for obtaining money through the mails by false pretenses, instruct postmasters to mark "fraudulent" and return registered letters, directed to such person, to the postmasters at the offices at which they were mailed, to be returned to the writers thereof; and may forbid the payment by any postmaster to any such person of any postal money drawn to his order or in his favor. It was held by Judge Sage of the United States Circuit Court for the Southern District of Ohio in the case of Enterprise Sav. Ass'n v. Zumstein, 64 Fed. Rep. 837, that the discretion of the postmaster general in respect to the matters referred to in such statutes cannot be supervised or controlled by the federal courts. The following is from the opinion:

No citizen has a vested right to the use either of the registered letter or postal money order system. Every citizen has the privilege of both, subject to the discretion which is vested in the postmaster general. It is the duty of every postmaster to obey the orders of the postmaster general, made in pursuance of the statutory provisions above quoted, and in the exercise of his discretion. The question then is whether this discretion can be supervised or controlled by Federal Courts. It is not a new question. It was first considered in the case of Marbury v. Madison, 1 Cranch, 137. In that case, at page 166, the Supreme Court was of opinion that the president is vested with certain political power, to be exercised in his own discretion. Whatever opinion might be entertained of the manner in which that discretion was used, there existed and could exist no power to control it.

It has been repeatedly held by the Supreme Court that a *mandamus* will not lie to the head of a department to enforce the performance of an executive duty involving the exercise of judgment or discretion. See Bank v. Paulding, 14 Pet. 497; Brashear v. Mason, 6 How. 92; U. S. v. Seaman, 17 How. 225; Gaines v. Thompson, 7 Wall. 347. In Gaines v. Thompson, it was held that the act of the secretary of the interior and of the commissioner of the land office in canceling an entry for land is not a ministerial duty, but is a matter resting in the judgment and discretion of those officers, as representing the executive department; and that the court would not interfere by injunction more than by *mandamus* to control it. Mr. Justice Miller, in delivering the opinion of the court, reviews the cases from Marburg v. Madison down. A ministerial duty was defined in Mississippi v. Johnson, 4 Wall. 475, as one in respect to which nothing is left to discretion. In Gaines v. Thompson the court held that an officer to whom public duties are confided by law is not subject to the control of the courts in the exercise of the judgment and discretion with which he is vested by law. The reason given by the court is that the law reposes the discretion in the officer, and not in the courts.

To the same effect are U. S. v. Black, 128 U. S. 40, 9 Sup. Ct. Rep. 12, and U. S. v. Windom, 137 U. S. 636, 11 Sup. Ct. Rep. 197.

MASTER AND SERVANT—FELLOW-SERVANT—PULLMAN CAR PORTER — NEGLIGENCE.—In Jones v. St. Louis Southwestern Ry. Co., 28 S. W. Rep. 883, it is held by the Supreme Court of Missouri that a porter of a palace car, whose duties are to collect fares and wait on passengers in such car, and who by his contract with the car company, and the contract between the latter and the railroad company, is subject to the rules of the railroad company, is not a fellow-servant of the engineer and conductor operating the train of which such car is a part. Macfarlane, J., says on this point:

The first inquiry is whether plaintiff had such relation to the offending conductor and engineer as made him a co-servant with them, within the rule which would exempt the defendant, as the common master, from liability. That plaintiff was at the time of his injury under the general employment of the Pullman Company, and that his services were paid for by it, is not disputed. Under the general rule, these facts, without qualification, would make him the servant of that company. If he was also a servant of defendant, he was so by virtue of the contract between his general employer and the defendant, which was acquiesced in by himself. It is true, as the authorities cited by counsel for defendant clearly demonstrate, that the relation of master and servant may exist, though the latter is neither employed nor paid by the former. Thus it is said: "The general servant of A may for a time, or on a particular occasion, be the servant of B; and a person who is not under any paid

contract of service may nevertheless have put himself under the control of an employer, to act in the capacity of servant." (1891) App. Cas. 371; Color Co. v. Conlon, 92 Mo. 221, 4 S. W. Rep. 922. This principle has been applied in cases in which the general master has, with the consent of his servants, hired them to another, giving the latter complete control and direction of them. Rourke v. Colliery, 1 C. P. Div. 556; Morgan v. Smith (Mass.), 35 N. E. Rep. 101; Brown v. Smith, 86 Ga. 274, 12 S. E. Rep. 411; Wyllie v. Palmer (N. Y.), 33 N. E. Rep. 381. There can be no doubt, under the agreement between the defendant and the Pullman Company, that the principal duties of plaintiff pertained to the business of his general employer, the Pullman Company. As to all such duties he was subject to its exclusive control and direction. The duties of the respective servants of the two companies were common only in respect to providing for the safety and comfort of the passengers of the defendant, or such of them as sought the special accommodations afforded by the Pullman Car Company. As to these matters, the employees of that company in charge of its cars were in law the servants of defendant. "Their negligence, or the negligence of either of them, as to any matters involving the safety or security of passengers while being conveyed, was the negligence of the railroad company." Railroad Co. v. Roy, 102 U. S. 457; Railroad Co. v. Walrath, 38 Ohio St. 461; Thorpe v. Railway Co., 76 N. Y. 402; Dwinvelle v. Railroad Co., 120 N. Y. 122, 24 N. E. Rep. 319; Railroad Co. v. Katzenberger, 16 Lea, 380, 1 S. W. Rep. 44; 3 Wood, Ry. 1701. In these cases it was held that the employees in charge of Pullman cars are to be treated as the servants of the transportation company, in all matters pertaining to the safety and security of the passenger, and such company will be liable for all damage to passengers resulting from their negligence or misconduct. The relation of master and servant, and the liability of the master, are placed upon the law applicable to common carriers, though in direct contravention of contracts between the two companies. The law will not permit a carrier to evade its duties by means of a contract with a third party. We do not think the relationship of master and servant thus created by law, and independent of contract, would necessarily constitute the servants of the two companies fellow-servants, within the rule "*respondeat superior;*" most certainly not in respect of duties which were not common. The injury resulted from the negligent management of the train. There was nothing, either in the agreement of plaintiff, or in the contract between the defendant and the Pullman Company, which required him to assist in running and managing the train, nor did his duties to the Pullman Company require it of him. Plaintiff, and the negligent servants of defendant, did not have a common employer, and the duties, a neglect of which caused the damage, were not common; and under neither the general rule, nor any exception to it, can they be regarded as fellow-servants, in the sense of relieving defendant of liability. Plaintiff can only be regarded as the servant of the Pullman Company, except in the performance of such duties as defendant had the right to direct and control, or of such as pertained to the safety and security of passengers. While merely riding in the Pullman car, and looking after the welfare of the passengers therein, he was in no sense a fellow-servant of those operating the engine and train. There was neither a common employer, a common director, nor a common service.

PROPERTY IN GROWING TREES.

"Land comprehendeth in its legal significance any ground, soil or earth whatsoever, as meadows, pastures, woods, moors, waters, and marshes. It has also in its legal significance an indefinite extent upward as well as downward."[1]

Growing trees are regarded as a part of the land to which they are attached.[2] The word land is comprehensive in its import, and includes many things besides the earth we tread on as waters, grass, stones, buildings, fences, trees, and the like.[3] And trees planted by the mortgagor after the execution of the mortgage become a part of the realty.[4]

By the fourth section of the statute of frauds, it is provided that no contract for the sale of lands shall be valid unless the agreement or some memorandum or note thereof be in writing. But land may be so divided that one person may own the surface, another the mines under the surface, and a third the trees and erections on the surface.[5]

With regard to property in growing trees thus far the law is well settled. But what rights a vendee has who verbally acquired an interest in growing trees, is a question by no means settled, and to this our discussion will be confined.

If such a sale is for an interest in land and hence within the fourth section of the statute of frauds, the sale is invalid, and the vendee acquires no interest in the trees. On the other hand if such a contract is not for an interest in land, but a sale of chattels, and hence within the seventeenth article of the statute of frauds, the sale is effectual as soon as a part of the trees have been received by the vendee and he has acquired an irrevocable license to enter and remove the trees.[6]

This doctrine that a sale of trees is not a sale of an interest in land, had its origin, it would seem, from 1 Ld. Raym. 182, where C. J. Treby reported to the other judges that the question had arisen before him at *nisi prius*, whether a sale of timber growing upon land ought to be in writing, by the statute of

[1] 1 Cruise, 54.
[2] Owens v. Lewis, 46 Ind. 488.
[3] Green v. Armstrong, 1 Denio, 554.
[4] Price v. Brayton, 19 Iowa, 309.
[5] Tiedeman on Real Property, § 10; Putnam v. Tuttle, 10 Gray, 48; Clapp v. Draper, 4 Mass. 266.
[6] 3 Washburn on Real Property, 364.

frauds, or might be by parol, and he ruled that it might be by parol.[7]

The English rule in this case has been established in a leading case recently.[8] Here it was held that by a parol sale of trees an interest in land does not pass. A number of trees had been sold and after a part of the number had been severed from the freehold, the vendor forbade the vendee entering to cut the remaining trees. But the court held that the vendee had the right to enter and remove the remainder of the trees, under the license given him by the vendor.

In this case the trees were to have been removed as soon as possible. As a part of the trees had been accepted, it fell within the seventeenth article of the statute of frands, and was therefore a valid sale of all the trees. A similar doctrine is held in Smith v. Shurman,[9] though in this case the vendor contracted to sell the timber at so much per foot, and from the nature of the contract it must be taken to have been the same as if the parties had contracted for timber already felled.[10]

In but few courts in this country has as liberal a doctrine been held. In Kentucky it is held, that a sale of trees in contemplation of their immediate separation from the soil is a constructive severance and they pass as chattels; and the contract is not within the statute of frauds, though no definite time is fixed for their removal. And that selecting and marking the trees by the vendee is a constructive delivery, and the title vests in the purchaser as against the vendor.[11] A similar doctrine is held in Maryland. By that court it is held, that a sale of growing trees does not pass an interest in land, but the trees pass as chattels.[12]

But these are more liberal views than are generally held. Thus, in Massachusetts, although such a sale does not pass an interest in the soil,[13] it is held that a sale by parol simply gives the vendee the right to enter upon the land and remove the trees, and that so long as the timber remains uncut the vendor may revoke the license given the vendee. The court says: "That such a contract is not invalid as passing an interest in land is too well settled to admit of doubt. It is only an executory contract of sale, to be construed as conveying an interest in trees when they shall be severed from the freehold, and shall become converted into personal property."[14] But in New Jersey it is held that such a sale of trees does not convey an interest in land, and in order to be valid must be in writing unless the trees are severed from the freehold.[15] This is the Wisconsin rule.[16] So in Indiana it has been decided in the leading case of Owens v. Lewis,[17] that contracts for the sale of timber are contracts for the sale of an interest in land, and must be in writing under the statute of frauds. But that "a parol agreement for the sale of growing trees, the trees to be severed and taken from the land by the vendee will amount to a license to the vendor's land for the purpose of making such severance; and if the license is not revoked before the trees are severed, the title of the trees will vest in the vendee, and the license after severance will become coupled with an interest and irrevocable, and the vendee will have the perfect right to enter and remove the timber thus severed; but if, before the trees are severed, the vendor should revoke such license, no title will pass to the vendee and no right will vest by virtue of such contract."

This doctrine is followed in a later case in the same State.[18] A similar doctrine is held in Michigan.[19] And it is further held that a license given a third party by the vendor to cut and remove standing timber will not revoke the former license until notice is given the first licensee.[20] That a sale of standing timber is void only at the option of the parties concerned, and that if they elect to treat it as valid it may become effectual for all purposes. The permission to cut and remove must be considered continuous until actually recalled; and as fast as the trees

[7] Kingsley v. Holbrook, 45 N. H. 313.
[8] Marshall v. Green, 33 L. T. Rep. 404.
[9] 9 B. & C. 561.
[10] Rodwell v. Phillips, 9 M. & W. 505.
[11] Byamee v. Ruse, 4 Met. 372; Cain v. McGuire, 13 B. Mon. 340.
[12] Smith v. Bryan, 5 Ind. 141.
[13] Whitemarsh v. Walker, 1 Met. 313; Chapin v. Carpenter, 4 Met. 580.
[14] Giles v. Limons, 15 Gray, 441; Fletcher v. Livingston, 153 Mass. 388.
[15] Slocum v. Seymour, 36 N. J. 138.
[16] Daniels v. Bailey, 43 Wis. 566; Young v. Lego, 36 Wis. 394; Lillie v. Dunbar, 62 Wis. 198.
[17] Owens v. Lewis, 46 Ind. 488.
[18] Armstrong v. Lawson, 73 Ind. 498.
[19] Ward v. Rapp, 79 Mich. 469.
[20] White v. King, 87 Mich. 107.

were separated from the realty by the cutting, the contract of sale attached to them as chattels.[21]

So in North Carolina if the contract is in contemplation of severance from the land, the trees become personal property.[22]

The principle now most generally recognized seems to be this: That in contracts for things annexed to and growing upon the soil for a time for the purpose of future growth and profit of that which is the subject of sale, it is an interest in land within the fourth section of the statute of frauds and must be proved by writing; but where the thing is sold in prospect of separation from the soil immediately, or within reasonable and convenient time, without any stipulation of the beneficial use of the soil but with a mere license to enter and take it away, it is to be regarded as substantially a sale of goods only, and so not within this section of the statute.[23]

Where the contract of sale is not for standing timber, but for the wood cut therefrom to be measured after cutting, it is without the statute.[24] And the fact that it has not been measured does not change the rule.[25]

A mortgage of growing timber made by one who has purchased it is a mortgage of personal property, to take effect as soon as the trees are cut; and such may be recorded as a chattel mortgage and not as a real estate mortgage.[26].

But in all cases where such a sale is construed to be a license, the timber must be removed within a reasonable time.[27]

Nothing but a deed can convey timber that is to be removed any time thereafter.[28] So, where the vendee has a certain length of time in which to remove the timber, it is a sale of an interest in land and must be in writing.[29] So, where the vendee has an indefinite length of time in which to remove the timber, the contract must be in writing.[30]

When no time is fixed for the removal of the trees a reasonable time is presumed.[31]

But the license is a personal one, and expires with the death of either party.[32]

Although the vendee has paid a valuable consideration for the timber, yet the license may be revoked before it is executed.[33]

Whether a sale of timber carries with it an interest in land depends largely on the instrument of transfer. A simple oral contract for the sale of trees to be removed within a definite time would be construed as not intending to convey an interest in land, because the parties must have known that such would be its effect, while the same words if incorporated in a deed will be held to convey an interest in realty.[34] In such cases much depends upon the intention of the parties and the nature of the contract. If the agreement does not contemplate the immediate severance of the timber, it is a contract for the sale of the land. But where the agreement is made with a view of the immediate severance of the timber from the soil it is regarded as a sale of personal property.[35] And where trees are specifically sold, and by the terms of the contract are to be separately delivered as chattels, such a sale is a sale of personal property.[36]

The rigid requirements of the statute of frauds have been so far relaxed by courts of equity that effect is sometimes given to verbal agreements for an estate or interest in land; but it is only in cases where the contract, in all essential parts is established by clear proof, and where it has been so far executed that it would be unjust and inequitable to rescind it, and this is done in order that the statute itself may not become an instrument of fraud.[37]

A license once given may be revoked either by the licensee being forbidden to cut the timber, or by a conveyance to a third party.[38]

[21] Shalding v. Archibald, 17 N. W. Rep. 940.
[22] Carpenter v. Medford, 6 Am. St. Rep. 535.
[23] Greenleaf's Cruise, § 45; Cady v. Sanford, 53 Vt. 632; Carpenter v. Medford, 99 N. C. 495.
[24] Killimore v. Hawlett, 48 N. Y. 569; Pitch v. Buck, 38 Vt. 683; Cook v. Whiting, 16 Ill. 480; Smith v. Shurman, 9 B. & C. 561.
[25] Gatzmer v. Mayer, 13 Atl. Rep. 540.
[26] Chaflin v. Carpenter, 4 Met. 580.
[27] Hill v. Hill, 113 Mass. 103; Andrews v. Wade, 4 Gen. Rep. 689.
[28] Goodyear v. Vogburg, 57 Barbour, 243.
[29] Olmstead v. Niles, 7 N. H. 522; Putney v. Day, 6 N. H. 430.
[30] Olmstead v. Niles, 7 N. H. 522; Putney v. Day, 6 N. H. 430.
[31] Hove v. Batcheiter, 49 N. H. 204.
[32] Ruggles v. Lesure, 12 Pick. 190.
[33] Drake v. Mills, 11 Allen, 141.
[34] White v. Foster, 102 Mass. 375.
[35] McClintock's Appeal, 71 Pa. St. 365.
[36] Browne's Statutes of Frauds, Sec. 237; 1 Gr. Ev. § 271.
[37] Bowers v. Bowers, 95 Pa. St. 477.
[38] Ward v. Rapp, 79 Mich. 469; Vorebeck v. Roe, 50 Barb. 302.

In case the licensor revokes the license the licensee may maintain an action for breach of contract.[39] But this is not always so.[40]

GEORGE C. FLETT.

[39] Fletcher v. Livingston, 153 Mass. 388.
[40] Armstrong v. Lawson, 73 Ind. 498.

ACTION FOR PERSONAL INJURY—RELEASE—QUESTION FOR JURY.

GIBSON V. WESTERN NEW YORK & P. R. CO.

Supreme Court of Pennsylvania, October 1, 1894.

In an action for personal injuries, where a release of plaintiff's claims is pleaded in defense, plaintiff's capacity to execute such release is a question for the jury. In an action for personal injuries, where a release pleaded in defense is attacked for mental incapacity of plaintiff when it was executed, evidence that plaintiff, after restoration of all his faculties, kept the money paid for the release, and accepted payment of his bills at the hospital, with full knowledge as to where the money came from and who paid his bills, and why, shows conclusively a ratification of the release. Sterrett, C. J., dissenting.

DEAN, J.: The plaintiff, a farmer by occupation, on 23d of December, 1890, while a passenger on defendant's railroad, was injured in a wreck near Bradford. His left shoulder was dislocated and broken, and his injury, if not permanent, for a long time will seriously disable him in the performance of hard, manual labor. The wreck occurred about noon, and the same day the railroad company had him removed to the Riddell House, in the town of Bradford. He received some attention the same evening, and the next morning, when about to leave for his home, was visited by Mr. Wilmoth, the agent of the railroad company, and Dr. Benninghoff, the company's surgeon, who persuaded him to stay and be treated by the company's surgeons. About 11 o'clock in the forenoon of the same day, Dr. Benninghoff, accompanied by Drs. James and Stewart, two other surgeons, again visited him, to make an examination of his injuries, and apply such remedy as was demanded. Anæsthetics,—chloroform and ether,—to the extent of bringing about insensibility to pain, and unconsciousness, were administered. The examination was made, and the shoulder given such treatment as the nature of the injury called for. He was insensible from the anæsthetics for 25 to 30 minutes, and in this time the surgeons work was finished. Consciousness returned in five to ten minutes after. He then talked rationally; told the surgeons they would find some of his clothing in his satchel, then in the room, and seemed, if not entirely restored, to be rapidly regaining a normal condition. The surgeons then left. In about three-quarters of an hour, Dr. Stewart returned to the room, and remained from five to ten minutes; inquired as to his condition, and he replied he was feeling well, except some pain in his shoulder. He seemed then to have completely recovered. Between 4 and 5 o'clock in the afternoon of the same day, J. D. Hancock, Esq., solicitor, and B. J. Wilmoth, agent of the company, called upon him for the purpose of settling, and obtaining a release of, any claim he had for damages against the company because of his injury. They informed him of their object, and talked with him about his injury, and the basis of computation for payment. He thought he ought to have his wages while unable to work, at the rate of $1.50 per day, and possibly the cost of caring for him while getting well. He named $150 as a reasonable sum, covering his loss of earnings. Mr. Hancock thought this was not enough, considering the probable loss of time before he would recover from such an injury, and suggested the payment of $240 and he willingly accepted the offer. A release was drawn, read to him, and he affixed his signature. He expressed an intention of immediately returning home, but yielding to their persuasions, and suggestion that he would have better treatment in the hospital at Bradford, he agreed to remain. The $240 was handed him in money. He requested Mr. Hancock to take his pocketbook out of his hip pocket. He did so. Plaintiff then counted over the $240, took a small sum of his own out of the pocketbook, and put altogether back in the pocketbook. Mr. Hancock told him that all his bills would be paid, and, when about leaving the room, plaintiff said, "if it should happen I don't entirely recover the use of my limb, I will expect this company to give me a place." The accident happened on Tuesday. The following Friday, plaintiff went to the hospital in Bradford, where he remained more than three months; and about six months after the accident, on 11th June, 1891, he brought this suit to recover damages for the injury caused by the company's negligence. On the trial there was no denial by the company of its liability for damages. The release, however, was set up as a complete defense. To this the plaintiff replied that at the time it was executed his mental condition, resulting from his injury and the effect of the anæsthetics, was such that he was wholly irresponsible; that he not only did not comprehend the nature of the contract signed by him, but was not conscious that he was signing any paper relating to the subject of the contract. The defendant replied that even if this were so, afterwards, at a time when no mental incapacity is alleged, he, by distinct and unequivocal declarations and acts, ratified the contract. The court submitted all the evidence bearing on the disputed points to the jury, who found a verdict of $5,134.08 for the plaintiff. Judgment having been entered on the verdict, the defendant appeals.

The assignments of error, although seven in number, may be readily condensed to two, and still embrace all there is of substance in the errors complained of.

The court affirmed peremptorily plaintiff's first

point, asking that the jury be instructed, if the release was signed by plaintiff when, by reason of the effect of the anæsthetic, he did not know or understand the nature of the act, it was not binding upon him, and peremptorily negatived defendant's second point, which asked the court to declare that, as it was not disputed plaintiff had accepted the $240 and signed the release, and as he now sought to invalidate the writing on the ground of mental incapacity at the time of its execution, he must establish such mental incapacity by evidence so clear, precise, and convincing as to satisfy the court, sitting as a chancellor, of the existence of the fact. If counsel for defendant could have convinced the court of the correctness of their view of the law, there would have been no verdict against their client, for, sitting as a chancellor, the learned judge of the court below was by no means convinced of plaintiff's mental incapacity when he executed the release. The case had once been tried, with about the same verdict, which, on a motion for a new trial, was set aside by the court, in an opinion filed. In that opinion the learned judge says: "The vital question of fact was whether or not the plaintiff, at the time of signing the writing, * * * was or was not in possession of his mental faculties. There was evidence, by the testimony of plaintiff himself, which, if believed, clearly established his want of mental capacity at the time, and compelled us to submit the case to the jury. * * * A most careful and anxious review of the whole testimony has convinced us that the weight of the evidence was so clearly against this conclusion, and in favor of his entire rationality at the time of the execution of the writing, that the jury must have permitted their very natural sympathy for the unfortunate plaintiff, whose case is a hard one, or their prejudices against corporations, to override their judgment." And the second trial apparently produced no change in his mind, for on the second motion for a new trial, in overruling it, he says: "In our opinion the verdict is against the weight of the evidence. For this cause we granted a new trial after the first verdict. The question now is whether the defendant is entitled to successive new trials, until a jury shall render a verdict in accordance with the views of the court upon the facts. * * * While we are not absolutely limited to one new trial, two verdicts the same way ought not to be disturbed without the gravest reasons for believing that the jury have acted from mistake or corrupt motives. * * * No such suggestion is made in this case, nor have we any reason to believe that a new trial would produce a different result."

So, it is manifest, if appellant could have convinced the trial judge he was sitting as a chancellor, to administer equity, where there was no adequate remedy at law, he would have refused to set aside this release, because the evidence was wholly insufficient to satisfy his conscience. But the defense here rested on a contract, the existence of which depended on the assent of two minds to the same thing, in the same sense. While the evidence showed the physical act, which is evidence of assent,—the affixing of the signatures,—the plaintiff positively denied any exercise of mental faculty on his part in the execution of the contract. If there was no mind to impel the hand to affix the signature, there was no assent of two minds, and in respect of this there was no contract. Where fraud, accident, or mistake in the creation of the instrument is the defense, it is a purely equitable one, and equitable rules will be enforced as to the measure of proof to sustain it. But, where the defense rests on the existence of a fact involving no element of fraud, the evidence is for the jury, under the common-law rules of evidence. Lunacy can be given in evidence under the plea of *non est factum*. Bensel v. Chancellor, 5 Whart. 371. The rule of evidence is the same here as if defendant had pleaded a release, but alleged the instrument was lost, and had then given secondary evidence of its contents; then plaintiff had replied that no such paper had ever been executed. The contention would have been one of pure fact, involving no equities requiring the interposition of the conscience of a chancellor, who enforces contracts, not always because of right, but of grace, and will refuse a decree destructive of the effect of a deed on the uncorroborated testimony of a single witness. Here there is not a spark of evidence of any misrepresentation, fraud, or overreaching in the procurement of the contract. There is, however, the positive oath of the plaintiff that, from the effects of the anæsthetic, his intellectual faculties were in a state of paralysis, so complete that he had no knowledge of the contents of the paper, or that he was signing any instrument whatever. If this were the fact, then it could not bar his recovery, any more than if it had no existence. The plaintiff's claim was of right, according to law, and not of grace, according to equity. The dispute was as to the fact of a deed, not as to the equities under it. Whether the fact was established was to be answered by the conscience of the jury. Whether their finding was against the manifest weight of the evidence was for the determination of the court on a motion for a new trial, and not by binding instructions on the evidence. Nevertheless, we cannot but think that the court would have performed only a plain duty by expressing to the jury its opinion on this evidence, at the same time telling them they were not bound by it. In two opinions of record the learned judge, in unmistakable language, has declared the verdict was against the manifest weight of the evidence. A careful perusal of every word of this evidence prompts us to a like conclusion, but he had far better opportunities than we for forming an opinion. During the course of the trial he had the advantage of observation of the witnesses on the witness stand. Here were five disinterested witnesses, with every means of observation, on the day the paper was executed,

testifying positively to the mental capacity of the plaintiff, at the same time describing his conduct and giving his conversation. Four of them were men whose professional knowledge and experience must have so sharpened their perceptions that mental incapacity was not likely to escape their notice. Not a suspicion of their credibility is suggested. Yet the uncorroborated, contradictory testimony of the plaintiff, on whose oath depended a verdict, is accepted by the jury as the truth. We say uncorroborated, because the testimony of Nolan does not contradict that of the defendant's witnesses, and, if significant at all, it tends to prove that plaintiff's conversation, after the operation, was connected and rational. The best that can be said of the verdict on the first question is that the credibility of witnesses was passed on by the jury, and that they, in face of all probability, decided that the testimony of one pecuniarily interested witness was more worthy of belief than that of five pecuniarily disinterested ones; and thus the functions of the jury were preserved, while it is somewhat doubtful whether the functions of the court were. In this there was no error which we can correct on review. To what length the trial court shall go, in efforts to correct injustice by granting new trials, is in their discretion, not ours.

The second error preferred by defendant is raised by the answer of the court to its sixth and seventh points. The court was requested to say to the jury "that if the plaintiff, after being restored to consciousness, knew, or had reason to believe and did believe, that the $240 was money left with him by the officials of the railroad, and as compensation for his injuries, and, knowing or believing this, he made no offer to return the money, but retained and still retains it, such retention is an acquiescence in and ratification of the release;" and then, by the seventh, "that under the whole evidence the verdict should be for defendant." Taking these points together, should both have received an unqualified affirmation? Assuming that plaintiff was not conscious of the act when he signed the release and accepted the money, what knowledge did he have of the subject afterwards, when restored to mental health? And does his conduct then amount to ratification? Any evidence, of a clear and unequivocal character, showing an intention to affirm, will bind him, and it is not necessary that the affirmance be as solemn as the original act itself. Acquiescence, with other circumstances, may establish ratification. Irvine v. Irvine, 9 Wall. 627; Sims v. Everhardt, 102 U. S. 312; Frink v. Roe, 70 Cal. 311, 11 Cal. 820. "If he will knowingly, and in the exercise of his proper faculties, take the benefit of a contract made while he was insane, it is competent for him to do so. But the consequence will be to give force and effect and legal validity to the contract, which was before voidable." Allis v. Billings, 6 Metc. (Mass.) 415. Or, as is said in Arnold v. Iron Works, 1 Gray, 434, when he retained and enjoyed the benefits of the contract: "Had he then full capacity to judge? Could he then balance the advantages and disadvantages to himself?" The same principle was again announced in Gibson v. Soper, 6 Gray, 279, in the case of a conveyance of land: "If the grantor, having been restored to sound mind, still retains and uses the consideration of the deed, without offerings to restore, or seeks to enforce the securities or avail himself of the contract which constitutes the consideration, such conduct may furnish satisfactory, and it may be conclusive, evidence of ratification." To the same effect is Pearsoll v. Chapin, 44 Pa. St. 9, where the same principle is held applicable to contracts merely voidable, and which are the subject of affirmance or ratification without a new consideration.

What was the evidence bearing on the question of ratification? The last seen of the $240, before he went to the hospital, was when plaintiff was yet at the Riddell House, in his room. Then he placed it in his pocketbook, with $10 of his own. This was Wednesday evening. On Friday he went to the hospital. The same day the pocketbook, with the money, was delivered to Miss M. D. Whitney, the matron, by one of the nurses. She then took it to plaintiff for purpose of giving him a receipt for it, which she did, and he said to her, naming the amount, it was the money he got from the railroad company in settlement for his injury. Afterwards he told her the railroad company had offered him work. He said to Mrs. Ellen Lee, about 10 days after his admission to the hospital, that he had settled with the railroad company, and they had paid him. She was there visiting another patient, D. P. Smith, an inmate of the hospital. Smith and plaintiff also talked together concerning a settlement with the railroad company. Plaintiff said he had settled with the company, and they had paid him $240, and agreed to pay his expenses while at the hospital. That they had talked together three or four different times on the same subject, and plaintiff expressed his satisfaction with the settlement. Dr. A. M. Straight visited him in the hospital two or three weeks after his admission, and plaintiff told him he had settled with the railroad company for $240, and they were to pay his expenses until he got able to be out. The doctor suggested a further operation on his shoulder, and plaintiff requested it to be done soon, as he was there at the expense of the railroad company. He said to Dr. Benninghoff, about two months after he had been in the hospital, that Wilmoth, the agent of the company, had promised to get him a situation. As has been noticed in discussing the first question raised by the assignments of error, solicitor Hancock and agent Wilmoth had made him a conditional promise of a situation at the time the release was signed. On this subject, Mr. Wilmoth testifies that about three months after the accident he received from plaintiff, while he was still in the hospital, a letter which is now lost, in

which he asked for a position on the railroad. He made application, and secured the situation of watchman for him at Olean; then in a few days, informed plaintiff, who said he was first going home, and then would tell him if he would accept it. The witness further stated that the company paid all the bills at the hotel and hospital. The plaintiff says, when he counted the money on the evening of the second day at the hotel, there was $250 in the pocketbook, and he had no knowledge from whence it came; that he gave the money to the nurse at the hospital. Then follow this question and answer: "Q. You said nothing to her about where you got the money? A. Not that I know of. The question was not asked me." When asked if the conversation occurred as testified to by Drs. Benninghoff and Straight, he answered, "Not that I know of." When asked if the conversation narrated by Daniel Smith had been had, he answered, "Not that I know of," but further on said he told him there was $240 left there, but he did not know who left it. Then in this question: "State how you thought that $240 got into your pocketbook. A. I don't understand the question." Then, on the question being repeated, he said: "I don't know how I thought it got in there. I can't remember my thoughts at that time. I didn't write them down." He further testified then he never saw Mrs. Lee, that he knew of. He admitted that at the first trial he had said "he didn't know, but supposed" the company had given it, for he had more money than he had before. He further stated, at the close of his testimony, that he had never said to any one he had settled with the railroad company; that what he did say was that the railroad company claimed they had settled with him, but that he had not settled with the railroad company, to his knowledge. From the testimony of these witnesses called by defendant, and the plaintiff's own statement in answer to it, there can be no dispute that after he entered the hospital he knew, in some way, that a settlement had been made, and the principal terms of it. He knew he had the money, and where it came from, and that the company had agreed to pay his bills; and, while not undisputed, there is little doubt that, as part of the consideration, he expected, up until he left the hospital, to get from the company employment. Whatever may have been the condition of his mind four or five hours after the operation, when the paper was signed, there is no pretense that it was not in a normal condition all the months he was at the hospital.

The evidence, then, shows without contradiction that the fact of a settlement, if not binding when first executed, was at this time known to him. With this knowledge, he retained the money, and has it to this day; never returned it, or offered to return it; permitted the company to pay all the bills for his surgical attention, support, and comfort at the hospital, and then solicited the employment that was conditionally promised him. This is undisputed evidence of ratification of a contract by distinct and unequivocal conduct and declarations when *compos mentis*, and of a contract, too, which could be ratified without a new consideration, because it was only void if he chose to so treat it. It was his duty, when he first learned of the existence of the release, to disavow it, and at least, before suit was brought, return or offer to return the money received under it, for it is not pretended any fraud was practiced upon him in obtaining the release. In its worst aspect, that was executed when those acting for the company were wholly ignorant of the incapacity which is now alleged to have existed. Every day that he retained the money, and continued to accept benefits, after a knowledge of the settlement, without regard to how he gained such knowledge, was in affirmance of it. One of the very points made by his counsel at the trial, requesting that the jury should allow defendant a credit for the $240, and render a verdict for the balance, was wholly inconsistent with their claim that no such contract existed. Where there is a disaffirmance of the contract because of fraud, the injured party may, in some cases, bring his action without repaying or offering to repay the money received on the fraudulent contract. In such case the money is retained, not as part of the consideration of a contract he denies, but as part indemnity for the fraud perpetrated on him. As he was deceived into accepting it by a falsehood or fraud, there is no admission that it was a consideration for a contract, and there is consequently no obligation on him to return it. But the case is wholly different when he seeks to avoid a contract solely because of a temporary incapacity when he made it,—an incapacity of which he gave no sign, and which was unknown to the other party to the contract. His conduct in keeping the money, in accepting payment of all his bills at the hospital, after restoration to complete mental health, with the undoubted knowledge as to where the money came from and as to who paid his bills, and why, is only consistent with an intention to affirm the contract. It is conclusive evidence of affirmance. He cannot both affirm and disaffirm; cannot affirm for what he got, and disaffirm for the difference between that and what he hoped to get. The defendant was entitled to an unqualified affirmation of its sixth and seventh points. Therefore the judgment is reversed, at costs of appellee.

NOTE.—The dissent in the principal case was upon the ground that, as there was testimony to show that the release set up was not in fact assented to by the plaintiff, it was the exclusive province of the jury to determine this question as well as that of ratification, and that the court in reversing the case upon these points invaded the province of the jury. It is undoubtedly true that both are questions of fact for the jury to determine. In Dixon v. R. R. Co., 100 N. Y. 170, the defendant set up a release, executed by plaintiff, of all claim for damages. There was testimony tending to show that, at the time the release was executed, plaintiff was in a condition of mind

that rendered him incompetent to appreciate the character of the instrument which he signed. The court held that it was for the jury to determine whether it was his free act, done with full knowledge, at the time, of the facts, and with a full appreciation of what he was doing. To the same effect are George v. Railroad Co., 34 Ark. 613, and Railroad Co. v. Lewis, 100 Ill. 120. The same principle is also recognized by Mr. Chief Justice Paxons in Ettinger v. Jones, 139 Pa. St. 218, 223, 21 Atl. Rep. 137.

It has been repeatedly held that if a release is obtained at a time when plaintiff was incapacitated to contract, it is void *ab initio*, as between the parties. An absolutely void instrument cannot affect the successful assertion of a legal right which it purports to release. The law on this point may be stated as follows: The injured party must when he signs the release have sufficient mental capacity and be made acquainted with its contents and must intend to sign such an instrument as is set up as a bar to his action. Shultz v. Chicago, etc. Ry. Co., 44 Wis. 638; Girard v. St. Louis Car Wheel Co., 39 Cent. L. J. 302; Sobieski v. St. Paul, etc. R. Co., 41 Minn. 169; Eagle Packet Co. v. Defries, 94 Ill. 598; Chicago, etc. R. Co. v. Mills, 105 Ill. 63; International, etc. R. Co. v. Brazzil, 78 Tex. 14; George v. St. Louis, etc. R. Co., 34 Ark. 613. So if a person while under the influence of drugs or opiates to such an extent as to be incapacitated to contract, is induced to execute a release it will not be obligatory. Chicago, etc. R. Co. v. Lewis, 109 Ill. 120; Chicago, etc. R. Co. v. Doyle, 18 Kan. 58. So if a release is procured by fraud, unfair advantage, duress or mistake it will not stand. 20 Amer. & Eng. Encyclopædia of Law, 763; Pennsylvania R. Co. v. Shay, 82 Pa. St. 198; Mo. Pac. Ry. Co. v. Brazzil, 72 Tex. 233; Conner v. Dundee Chemical Works (N. J.), 17 Atl. Rep. 975; Bussian v. Milwaukee, etc. R. Co., 56 Wis. 325; Rose v. West Philadelphia R. Co. (Pa.), 12 Atl. Rep. 78; Hobbs v. Brush Electric Light Co., 75 Mich. 550; Horwitz v. Forbes (Ind.), 22 Ind. Atl. Rep. 267. If the injured party was made to believe that he was merely signing a receipt (Chicago, etc. R. Co. v. Lewis, 109 Ind. 120), or if he was induced to sign by representations that his injuries were slight, would not become serious (Herschfield v. London, etc. R. Co., L. R. & Q. B. Div. 1), or if he was induced to sign by representations that the release covered merely time or wages lost (Ill. Cent. R. Co. v. Welch, 52 Ill. 183), it will be void as to the party who was induced to execute it. If a railroad company employs a near relative of the injured party to use his influence over her and to take advantage of her situation and poverty in order to get her to sign a release it cannot stand. Stone v. Chicago, etc. R. Co. (Mich.), 30 Amer. & Eng. R. Cases, 600. And if the physician attending the injured person practices a fraud upon her and makes fraudulent representations as to the papers she signs she is not bound by it. A very late case on this subject is McFarland v. Mo. Pac. Ry. Co., 28 S. W. Rep. 590. There plaintiff while suffering from the injuries complained of, executed a release of all claims against defendant railroad company, and accepted a fixed sum, which she afterwards tendered back to the company. Her testimony showed that she fully understood the nature and effect of the release at the time she executed it, and knew that the doctor who procured it from her was an agent of the company. It also tended to show that defendant's doctor had told her that she would be "up and around in ten days or two weeks," but that it was three months before she could walk as well as usual. There was no evidence that the doctor's remark was made to deceive her as to the extent of her injuries, which she admitted were properly described in the release. She also testified that the doctor had told her that "parties usually didn't get anything" when they sued the company, but offered no evidence to show the falsity of the statement. It was held that the evidence failed to establish fraud which would entitle plaintiff to avoid the release.

Another late case is Jones v. Alabama & V. Ry. Co. (Miss.), 16 South. Rep. 379. There the plaintiff, an aged negro, in less than 12 hours after the amputation of his foot, while stupid from opiates, waking only when aroused, and in pain, was induced, in the absence of his friends, by the officials of the defendant railroad company, to release his claim of damages for the loss of his foot against the company in consideration of $300.

It was held that the release was void, following the case of Evans v. Llewellin, 1 Cox. Ch. 333, decided in 1787, and Bean v. Railroad Company, 107 N. C. 743. A release procured by fraud or executed by a person incapable of contracting may be subsequently ratified, as the principal case shows. 20 Amer. & Eng. Encyclopædia of Law, 763; International, etc. R. Co. v. Brazzil, 78 Tex. 314. And as the dissenting judge in the principal case insists the question of ratification is one for the determination of the jury. Jones v. Alabama & V. Ry. Co. (Miss.), 16 South. Rep. 379. Bussian v. Railway Co. (Wis.), 14 N. W. Rep. 452; Railway Co. v. Mills, 11 Am. & Eng. R. Cas. 128; Dixon v. Railroad Co. (N. Y. App.), 3 N. E. Rep. 65. If the release was void, no tender was necessary (Railway Co. v. Lewis. 109 Ill. 131; Mullen v. Railroad Co., 127 Mass. 86; Railroad Co. v. Doyle, 18 Kan. 58); but all that is necessary is that the jury, in case a verdict should be found for plaintiff, credit any amount they may find with the money paid plaintiff by defendant, and legal interest thereon, as clearly held in Llewellin's Case, 1 Cox, Ch. 333; Railroad Co. v. Doyle, 18 Kan. 58; Girard v. St. Louis Car Wheel Co. (Mo.), 39 Cent. L. J. 302.

JETSAM AND FLOTSAM.

PROPOSED CHANGES IN THE BRIBERY LAWS.

The Attorney General of Massachusetts, in his report for the year ending January 16, 1895, strongly advises material changes in the present bribery laws (p. 26 29). As long as a party to the offense may constitutionally refuse to testify, on the ground that it may tend to criminate him, it is of little use to establish machinery for the enforcement of law against corrupt practices in elections. Some effective way of securing such testimony must be adopted, it is urged, and the confinement of the criminality of the act to the person who pays the money is one of the means proposed. Whether this will work well in election cases or not, whether it would not be more expedient to punish the taker of the bribe rather than the giver, are serious and important questions. In Kansas, where the method suggested was carried into effect in 1869, and given the widest scope, the results seem to have been far from gratifying. Indeed, there is now an agitation for the repeal of that law, and the substitution of another making only the bribe-taker punishable, on the ground that it is much more probable that one who has bribed a public officer might make that fact known, than that the public officer would proclaim his own disgrace. This reasoning, while cer-

tainly strong when the recipient is a public official, makes rather the other way when he, as candidate, is the giver. Since it is practically with this latter case alone, *i. e.*, bribery at elections, that the Attorney-General is concerned, it would certainly seem that his suggestion was not open to the harsh criticisms which have been passed on the existing law of Kansas. In its present restricted form, the measure proposed appears a sound one; how it would succeed in a wider sphere might be an extremely dubious problem, and one which might require for its solution a long experience of the respective merits and disadvantages of each method of securing evidence.—*Harvard Law Review.*

HUMORS OF THE LAW.

Last winter Mr. Justice Harlan delivered a lecture on the Behring Sea Arbitration before a large audience of law students in a western city. His Honor, after taking up the legal side of the question, described graphically and learnedly the habits, migrations and peculiarities of the seal, with elaborate references to other animals which seemed to offer instructive analogies.

A few days after, a student who had read law a few months was asked how he liked the lecture. "O, very much," replied he, "very much indeed—very instructive—in fact I think I learned more Natural History from Justice Harlan than from all of Blackstone."

Mr. Justice Maule once addressed a phenomenon of innocence in a smock-frock in the following words: "Prisoner at the bar, your counsel thinks you innocent; the counsel for the prosecution thinks you innocent: I think you innocent. But a jury of your own countrymen in the exercise of such common sense as they possess, which does not seem to be much, have found you 'guilty,' and it remains that I should pass upon you the sentence of the law. That sentence is that you be kept in imprisonment for one day; and as that day was yesterday you may now go about your business."

A miller had his neighbor arrested upon the charge of stealing wheat from his mill, but being unable to substantiate the charge by proof the court adjudged that the miller should make an apology to the accused. "Well," said he, "I have had you arrested for stealing my wheat. I can't prove it, and am sorry for it."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ALTERATION OF DEED.—The erasure by the owner of a deed of the inital "H" from the name "Thomas H. Brown," grantee therein, renders the deed void.—JONES V. CROWLEY, N. J., 30 Atl. Rep. 871.

2. APPEAL—Parties.—Under Rev. St. 1894, § 647 (Rev. St. 1881, § 635), making it the duty of any one of the coparties to a judgment, who desires to appeal therefrom, to make all coparties to the appeal, all such coparties must be made coappellants.—VORDERMARK V. WILKINSON, Ind., 39 N. E. Rep. 441.

3. ASSIGNMENT FOR BENEFIT OF CREDITORS.—An assignment for benefit of creditors, providing for payment of assignor's "debts and liabilities, now due or to grow due," does not apply to a contingent liability, arising from the fact that thereafter the lessor in a lease, made to the assignor prior to the assignment, took possession of the premises and relet them, under provisions of the lease that if they became vacant he might relet them, and apply the avails in reduction of the rent.—IN RE HEVENOR, N. Y., 39 N. E. Rep. 303.

4. ASSIGNMENT FOR BENEFIT OF CREDITORS — Acceptance.—Where an assignment for the benefit of creditors requires the creditors to accept it, and release the debtor within a certain time, an acceptance, not under seal, stating that the creditor "agrees" to accept the assignment in discharge of his claim, is sufficient.—HEWITT V. DARLINGTON PHOSPHATE CO., S. Car., 20 S. E. Rep. 804.

5. ASSIGNMENT FOR BENEFIT OF CREDITORS — Collateral Security.—A creditor of an insolvent who holds collateral security must either surrender the collateral, or have its value determined by the court, and his claim will be allowed for the difference between the amount thereof and the value of the collateral.—NATIONAL UNION BANK V. NATIONAL MECHANICS' BANK, Md., 30 Atl. Rep. 913.

6. ASSIGNMENT FOR BENEFIT OF CREDITORS — Preferences.—A creditor, proceeding under Code, § 121, to avoid an assignment which his debtor has made for the benefit of all creditors, and to fasten a prior lien, cannot, for the first time on appeal, urge that the preferences in such assignment should be declared void, under section 124, for failure by the debtor to file a proper schedule of his assets therewith.—LOWENSTEIN V. LEACH, Miss., 16 South. Rep. 493.

7. ASSIGNMENT FOR CREDITORS—Validity.—A voluntary assignment for the benefit of creditors, to which none of the creditors have assented, is invalid as against execution creditors of the assignor.—ELLIOTT V. MONTELL, Del., 30 Atl. Rep. 854.

8. ASSIGNMENT FOR CREDITORS—Suit against Assignee.—A creditor of one who has assigned for the benefit of creditors cannot sue the assignee as for conversion of property upon allegations that the latter failed to qualify as assignee, that he converted the assigned

property, and that he failed to pay plaintiff's debt, though the property was sufficient to pay all the debts of the assignor.—DE WALT V. ZEIGLER, Tex., 29 S. W. Rep. 60.

9. ATTACHMENT—Affidavit. — An affidavit of attachment which describes deponent as the "agent of plaintiff" is sufficient, though he has signed his own name alone.—LA FORCE V. WEAR-BOOGHER DRY GOODS CO., Tex., 29 S. W. Rep. 75.

10. ATTACHMENT—Successive Levies. — An attaching creditor, who releases his lien under an agreement that the debtor shall make an assignment, may afterwards, for want of good faith in the assignment, retake the goods by a second levy under the writ, if there is no fraud or any intervening interest. — FIRST NAT. BANK OF BUTTE V. BOYCE, Mont., 38 Pac. Rep. 829.

11. ATTACHMENT—Unrecorded Deed—Notice.—An attaching creditor, who, before the completion of his levy and the perfection of his attachment by the issuance of a proper warrant, discovers an unrecorded deed of certain realty from his debtor to another, for a valuable consideration, will be deemed to have such notice thereof as to deprive his subsequent judgment of priority.—MERCHANTS' BLDG. & LOAN ASS'N V. BARBER, N. J., 30 Atl. Rep. 865.

12. ATTACHMENT — Wrongful Levy.—An action for damages sustained by the wrongful attachment of plaintiff's property cannot be maintained on the theory of defamation of plaintiff's title, where he has neither alleged nor shown malice therein.—GRAHAM V. RENO, Colo., 38 Pac. Rep. 835.

13. BOUNDARIES—Courses and Distances.—Where, in a deed of land, a boundary line is located at a certain distance from the starting point, which is fixed by a monument, such location will control a distance given which is not fixed by a monument.—OLSON V. KEITH, Mass., 39 N. E. Rep. 410.

14. CARRIER — Passenger—Failure to Buy Ticket.—A railroad company may require passengers to procure tickets, and, on their failure to do so, exact the regular fare instead of the reduced ticket fare, but must provide proper facilities for securing such tickets.—CLEVELAND, C. C. & ST. L. RY. CO. V. BECKETT, Ind., 39 N. E. Rep. 429.

15. CARRIERS — Injuries to Passengers.—In an action against a carrier for personal injuries caused by the negligence of defendant's servant in driving the coach into a post, thereby causing the horses to run away, evidence of negligence on the part of the servant in deserting the coach after the collision is admissible.—CAVENY V. NEELY, S. Car., 20 S. E. Rep. 806.

16. CARRIERS — Liability for Negligence.—A stipulation in a bill of lading that the owner, shipper, and consignee severally shall cause the goods to be insured, and that in case of loss the carrier shall have the benefit of the insurance, if such loss "shall occur from any cause which shall be held to render this line or any of its agents liable therefor," is a contract intended to protect the carrier against the consequences of its own negligence, and is void.—WILLOCK V. PENNSYLVANIA R. CO., Penn., 30 Atl. Rep. 948.

17. CARRIERS — Live Stock Shipments—Charges.—A carrier's rates from one station to another must be a single charge, and where live stock is shipped to Chicago the carrier cannot make a terminal charge for delivery at the stock yards, which are off its line, where, by its universal practice, for many years, it has made the stock yards its depot for delivery of live stock.—UNION TRUST CO. V. ATCHISON, T. & S. F. R. CO., U. S. C. C. (Ill.), 64 Fed. Rep. 992.

18. CARRIERS — Transportation of Live Stock.—The provision, in a contract for the transportation of live stock, that the carrier will not be liable for loss or injury to the stock shipped thereunder unless a claim therefor in writing is presented within 10 days of the time of their removal from the car, is reasonable.—CASE V. CLEVELAND, C. C. & ST. L. RY. CO., Ind., 39 N. E. Rep. 426.

19. CARRIERS OF PASSENGERS — Alighting from Moving Train.—Where a person boards a train to assist a friend thereon, intending to get off as soon as his friend was settled, but the company has no notice of his intention, and after the train starts he is injured in alighting, the company is not liable, where the train stopped the usual time, and plaintiff, before attempting to alight, did not request the employees to stop the train.—TEXAS & P. RY. CO. V. MCGILVARY, Tex., 29 S. W. Rep. 67.

20. CARRIERS OF PASSENGERS — Contributory Negligence.—Plaintiff, while riding on defendant's street car, gave a signal to the motorman to stop. When the car had almost come a stand, she stepped on the platform, and gave another signal, which she thought was a signal to stop. The car immediately started forward with a jerk, and plaintiff was thrown therefrom, and injured. It was not shown that the motorman or conductor knew of her danger, or that the record signal was necessary, or that it was the signal to stop, and not the regular signal for starting the car: Held, that plaintiff's injuries were caused by her own act.—SIRK V. MARION ST. RY. CO., Ind., 39 N. E. Rep. 421.

21. CERTIORARI—Motion to Dismiss.—Where the motion to dismiss *certiorari* was not filed at the return term of the writ, an agreement at that term to continue the case, "without prejudice to either party," will not authorize the filing of the motion at the term to which the continuance was had, under Rev. St. art. 311.—BURNS V. BISHOP, Tex., 29 S. W. Rep. 83.

22. CHATTEL MORTGAGE LIEN— Goods Subsequently Purchased.—As between the mortgagor and the mortgagee in a mortgage covering a stock of goods, which provides for their sale and replenishment from time to time, as may be necessary in conducting the business, the mortgagee, whether in possession or not has a lien upon goods purchased to renew those upon which the mortgage was given, but which have been sold.—ARMSTRONG V. FORD, Wash., 38 Pac. Rep. 866.

23. CHATTEL MORTGAGE—Validity as against Attaching Creditor.—As between a mortgagee, under an unacknowledged and unrecorded mortgage, and an attaching creditor of the mortgagor, the delivery to the mortgagee, by the mortgagor's assignee for creditors, of the key of the building in which the property is located, and the posting on the door of such building, by the mortgagee, of a notice that he is in possession of the property, constitute possession by the mortgagee, when the property consists of the boiler, engine, and other machinery of a steam laundry, though the mortgagee does not go into the building after the key is delivered to him.—ADLARD V. RODGERS, Cal., 38 Pac. Rep. 889.

24. CONTRACT—Building Contract— Performance.—A building contract provided that the payments should be made on the architect's certificate, and that the second payment would be due when all the work was completed, and the final payment 30 days later. It was provided that no certificate given, except that for the final payment, should be conclusive evidence of the performance of the contract: Held, that a certificate for the second payment did not dispense with the necessity for the final certificate. — BEHARRELL V. QUIMBY, Mass., 39 N. E. Rep. 407.

25. CONTRACT—College Class.— Liability. — Where a college class, at a class meeting, votes to publish a class book, the members voting or assenting to the vote are personally liable for the expense, at the suit of one who prints it, under a contract with a member of the class elected "business manager of the publication."—WILCOX V. ARNOLD, Mass., 39 N. E. Rep. 414.

26. CONTRACT — Counterclaim. — Where a plaintiff sues to recover a balance due under a contract to serve defendant as a farm laborer, and to take good care of the latter's stock, a counterclaim may properly be based upon an allegation that he cruelly killed a horse while working it.—HAYGOOD V. BONEY, S. Car., 20 S. E. Rep. 803.

27. CONTRACT—Provisions as to Payments.—A contractor for the building of a city sewer agreed to buy a certain quantity of pipe from a manufacturer thereof; payments to be made by a person designated a trustee, who held a power of attorney from the contractor to collect from the city all amounts due him under his contract. The trustee accepted the trust, to be construed with his power of attorney, which authorized him to pay only for materials used in the sewer: Held, that the trustee was not liable for pipe shipped to the contractor under the contract, but which was not used in the sewer.—WILLIAMS LACLEDE FIRE-BRICK MANUF'G CO., Colo., 38 Pac. Rep. 843.

28. CONTRACT—Public Policy. — An agreement between a sheriff and one of his deputies, by the terms of which the latter is to divide all his fees with the former,—the duties for which he would receive criminal fees being capable of performance by any peace officer, and such fees being payable directly to such deputy,—is void as against public policy.—DEYOE V. WOODWORTH, N. Y., 39 N. E. Rep. 375.

29. CORPORATIONS — Insolvency — Receiver.— While the mere insolvency of a corporation is not enough to authorize the appointment of a receiver at the suit of general creditors, yet when it clearly appears that on account of such insolvency, and the misconduct of its officers, the corporation is no longer able to proceed with its business, or its assets are in process of being fraudulently misapplied, to the injury of creditors, who are without other adequate means of relief, it becomes the duty of the court to appoint a receiver. Under such circumstances, the property of the corporation becomes a special fund, out of which creditors are entitled to satisfaction of their demands, and hence is the subject of an equitable lien or trust for their benefit.—DOE V. NORTHWEST COAL & TRANSPORTATION CO., U. S. C. C. (Oreg.), 64 Fed. Rep. 928.

30. CORPORATIONS — Stockholders — Claim for Personal Injuries.—The word "dues," as used in Const. art. 12, § 4, providing that "dues for corporations shall be secured by such individual liability of the stockholders as may be prescribed by law," includes damages for personal injuries.—FLENNIKEN V. MARSHALL, S. Car., 20 S. E. Rep. 788.

31. CORPORATION — Treasurer of Corporation.— The treasurer of a manufacturing company has no implied authority to bind a corporation as an accommodation indorser.—USHER V. RAYMOND SKATE CO., Mass., 39 N. E. Rep. 416.

32. COURTS—Jurisdiction—Claim by United States.—Where trespass to try title to land occupied as a fort by the United States was brought in a State District Court against the commanding officers as individuals, and the United States made themselves parties defendant,— the cause not being a suit against the United States, nor an attempt to subject the property thereof to suit,—said court had jurisdiction to try it.—UNITED STATES V. SCHWALBY, Tex., 29 S. W. Rep. 90.

33. COVENANT BY LESSEE—Construction.— Where a lessee covenants not to "make or suffer any waste or any unlawful, improper, or offensive use of said premises," he stipulates that there shall be no such use by himself or by any person occupying under him.—MILLER V. PRESCOTT, Mass., 39 N. E. Rep. 409.

34. COVENANT FOR RENT—Defenses.—Though, in an action of covenant for rent, an eviction cannot be shown unless specially pleaded, yet, when such defense is admitted without objection, the defect in the pleading will be overlooked.—MORRIS V. KETTLE, N. J., 30 Atl. Rep. 879.

35. COVENANT OF WARRANTY—Measure of Damages.—Liability for breach of a covenant of warranty must be determined by the laws in force when the contract of warranty was made.—AIKEN V. MCDONALD, S. Car., 20 S. E. Rep. 797.

36. CRIMINAL EVIDENCE — Murder — Dying Declarations.—The dying declarations of a murdered person are admissible to establish the identity of the murderer, when it is proven that (1) the death of deceased was imminent at the time the declarations were made; (2) that the deceased was so fully aware of this as to be without hope or recovery; and (3) that the subject of the charge was the death of the declarant, and the circumstances of the death were the subject of the declaration.—STATE V. FAILE, S. Car., 20 S. E. Rep. 798.

37. CRIMINAL LAW — Assault.—The exact words of a statute defining a crime need not be used in the indictment or information charging it, but words fairly importing the same idea are sufficient.—CHANDLER V. STATE, Ind., 39 N. E. Rep. 444.

38. CRIMINAL LAW—Former Jeopardy.—To make a defense of former jeopardy, the accused must show that he has been put upon his trial before a court with jurisdiction, upon indictment or information sufficient in form and substance to sustain conviction, and that a jury has been impaneled and sworn, and thus charged with his deliverance.—DULIN V. COMMONWEALTH, Va., 20 S. E. Rep. 821.

39. CRIMINAL LAW—Former Jeopardy.—Where, in a criminal trial, the jury after having deliberated on their verdict such a length of time as the trial court deemed reasonable, state in open court their inability to agree, and it appears that the court was satisfied that they would not agree, the action of the court in discharging them will not be reviewed on appeal on a plea of former jeopardy.—STATE V. REINHART, Oreg., 38 Pac. Rep. 822.

40. CRIMINAL LAW — Fornication.—One may be convicted of fornication though the evidence shows that, being a married man, he was also guilty of adultery.—COMMONWEALTH V. KAMMERDINER, Penn., 30 Atl. Rep. 929.

41. CRIMINAL LAW—Joint Indictment.—When two or more persons are indicted jointly, and all are not in custody, the court may in its discretion, try those in custody only, in spite of an objection that all should be tried jointly.—JACKSON V. STATE, Ala., 16 South. Rep. 523.

42. CRIMINAL PRACTICE — Larceny.—An indictment for larceny is sufficient which follows the language of the statute (Pen. Code, § 55), charging defendant, as a person enjoying the capacity of agent for another, with receiving certain property of his principal in the course of his employment, and fraudulently and feloniously converting it to his own use.—STATE V. TURNER, Wash., 38 Pac. Rep. 864.

43. CRIMINAL TRIAL — Remarks of Counsel.—Under Code 1892, § 1741, forbidding the prosecuting attorney to comment on the failure of accused to testify in his own behalf, such comment thereon is ground for reversing a conviction, though the court directed the jury to disregard it.—REDDICK V. STATE, Miss., 16 South. Rep. 490.

44. DEATH BY WRONGFUL ACT—Damages.—A parent may recover damages for the death of a child, although the latter never contributed to the parent's support.—MOLLIE GIBSON, ETC. CO. V. SHARP, Colo., 38 Pac. Rep. 850.

45. DEED — Reservation—Right of Way.—A deed of land, which reserves to the grantor a right of way over part of the land described, conveys to the grantee the fee to the whole of the land, including that part over which the right of way is reserved, subject to the use of such part for the purpose for which it was reserved.—MOFFITT V. LYTLE, Penn., 30 Atl. Rep. 922.

46. DOWER—Judgment in Foreclosure Suit.—A judgment for plaintiff in an action to foreclose a mortgage made by a decedent, in which his wife did not join, does not determine her right to dower, though she is a party to the action, no issue as to dower being raised.—NELSON V. BROWN, N. Y., 39 N. E. Rep. 355.

47. ESTOPPEL BY STATEMENT.—A statement does not create an estoppel, unless made with intent that the other party shall act thereon, or under circumstances which would reasonably induce a person of ordinary

prudence to so act.—KIERSKY v. NICHOLS, Tex., 29 S. W. Rep. 71.

48. EVIDENCE—Statement to Mercantile Agency.—A statement to a mercantile agency, signed on behalf of a firm by its book keeper, is not evidence against the firm, where they did not know of the statement, and there was no evidence that the bookkeeper had any authority to make it.—PRIOR v. NORTH TEXAS NATL. BANK, Tex., 29 S. W. Rep. 84.

49. FIXTURES—Bona Fide Purchasers—Insolvent Decedent's Estate.—An innocent purchaser of a building in which machinery had been placed so as to become a part of the realty, is not affected by an agreement between his vendor and the seller of the machinery, by the terms of which the latter was to retain the title to the machinery until it was paid for.—WENTWORTH v. S. A. WOODS MACH. CO., Mass., 39 N. E. Rep. 414.

50. FRAUDULENT CONVEYANCES — General Assignment.—The fact that chattel mortgages are given between midnight and morning, in anticipation of attachments by other creditors, that the mortgagees are relatives or intimate friends of the mortgagor, that they immediately foreclose and take possession, and that they are given for precedent debts, does not make them invalid, they being given *bona fide* and for a valuable consideration, in a State which allows preference of creditors except in connection with a general assignment.—DAVIS v. SCHWARTZ, U. S. S. C., 15 S. C. Rep. 238.

51. GARNISHMENT—Assignment of Wages.—An order by an employee on his employer, to pay his wages as they became due to a firm, does not, as against a creditor of the employee who garnished the employer, warrant the latter in paying the wages to a successor of the firm to whom all its assets were assigned.—CARD v. AHEARNE, R. I., 30 Atl. Rep. 850.

52. GARNISHMENT—Liability of Bank.—The fact that an insolvent national bank has gone into voluntary liquidation does not absolve it from liability to be garnished. —BIRMINGHAM NAT. BANK v. MAYER, Ala., 16 South. Rep. 520.

53. GARNISHMENT— Liability of Counties.—Counties are not liable as garnishees, though Code 1887, § 119, provides that the officer shall summon such persons as the plaintiff may direct, as garnishees, and section 442 extends the word "person" to "bodies politic and corporate," and under Gen. St. 1883, p. 254, "each organized county" is a body corporate and politic, and, as such, entitled to sue and be sued.—STERMER v. BOARD OF COM'RS OF LA PLATA CO., Colo., 38 Pac. Rep. 839.

54. HABEAS CORPUS—Order at Chambers.—An order of a State judge at chambers remanding a prisoner in a *habeas corpus* proceeding is not an order of a "court," within Rev. St. § 709, allowing a writ of error from the Supreme Court of the United States only to the final judgment of the highest court of the State in which a decision in the suit can be had.—MCKNIGHT v. JAMES, U. S. S. C., 15 S. C. Rep. 248.

55. HIGHWAY — Natural Gas Companies — Laying Pipes.—As abutting owners on a highway own the fee subject to the easement for road purposes, which do not include the building of a pipe line along it for conducting natural gas, and thus supplying it to the public, the legislature cannot authorize such a gas company, though engaged in a public enterprise, to so construct its line without making compensation to the abutting owner.—CONSUMERS' GAS TRUST CO. v. HUNTSINGER, Ind., 39 N. E. Rep. 423.

56. HOMESTEAD. — A person in possession of land under a verbal agreement of purchase, nothing having been paid thereon, cannot, as against one holding a chattel mortgage, on machinery, executed after the same was placed on the land by the mortgagor, but not affixed to it, claim a business homestead as to the machinery.—TAYLOR v. PRENDERGAST, Tex., 29 S. W. Rep. 87.

57. HOMESTEAD — Rights of Husband. — Where land owned by a husband exceeds in extent the amount exempt for homestead purposes, he may select any part thereof as a homestead, and mortgage the excess as security for his debt, provided the selection is made in good faith, and with no intention to defraud his wife of homestead rights.—CERVENKA v. DYCHES, Tex., 29 S. W. Rep. 61.

58. HUSBAND AND WIFE — Community Property.—Where the husband, after the death of his wife, disposes in entirety of a particular piece of community property, each of the heirs of the wife has a right of separate action for the recovery of the undivided portion of the property belonging to him which has been alienated. There is no obligation to make the other heirs parties.—LE BLEU v. NORTH AMERICAN LAND & TIMBER CO., La., 16 South. Rep. 501.

59. HUSBAND AND WIFE—Purchase by Wife—Resulting Trust.—When a husband purchases property with his wife's money, and takes the deed in his own name, a resulting trust is raised in her favor, unless it is shown that she intended the money as a gift or loan to her husband, the establishment of which fact devolves on the husband, or those claiming under him.—BERRY v. WEIDMAN, W. Va., 20 S. E. Rep. 817.

60. HUSBAND AND WIFE — Trust by Husband.—The parties being husband and wife, in an action by him to establish a constructive trust in certain land held by her, in which he alleges that the purchase money therefor belonged to him, the burden is on him to show fraud on her part.—SING BOW v. SING BOW, N. J., 30 Atl. Rep. 867.

61. INSURANCE—Condition of Policy.—A condition in a fire policy on buildings, that, "if the hazard be increased by any means within the control or knowledge of the insured," it shall be void, is intended to protect the property during the life of the policy from fire by change in its structure, methods of heating, addition of outbuildings, etc., and does not relate to a subsequent sale under a pre-existing judgment or incumbrance.—COLLINS v. LONDON ASSUR. CORP., Penn., 30 Atl. Rep. 924.

62. INSURANCE COMPANY—Receiver.— In an action by the receiver of an insurance company to recover assets belonging to the company, it is no defense that the proceedings for the appointment of the receiver were brought by the insurance commissioner, instead of by the State.—SMITH v. HOPKINS, Wash., 38 Pac. Rep. 854.

63. INTERSTATE COMMERCE COMMISSION.—The interstate commerce commission is not a court, but an administrative body, lawfully created, and lawfully exercising powers which are *quasi* judicial, as are the powers exercised by the commissioners of patents, and, in many respects, by the heads of the various departments of the executive branch of the government. Its rulings and decisions are entitled to the highest respect of the Federal Courts, and they are justly so regarded.—INTERSTATE COMMERCE COMMISSION v. CINCINNATI, N. O. & G. P. R. CO., U. S. C. C. (Ohio), 64 Fed. Rep. 981.

64. JUDGMENT—Injunction—Complaint.—In an action to enjoin the collection of a judgment, a transcript of the judgment, filed with the complaint as an exhibit, cannot be considered in determining the sufficiency of the complaint.—GUM-ELASTIC ROOFING CO. v. MEXICO PUB. CO., Ind., 39 N. E. Rep. 443.

65. JUDGMENT—Payment—Effect as against Surety.—A judgment was rendered against a principal and his surety, jointly, and the sheriff's sale of sufficient of the surety's land to pay the judgment was confirmed; and the judgment creditor, being paid, assigned the judgment to the surety: Held, that the judgment, at the time of its assignment, was *functus officio*, and the surety acquired, as assignee, no rights, either legal or equitable.—FULTON v. HARRINGTON, Dela., 30 Atl. Rep. 856.

66. JUDGMENT—Satisfaction by Attorney.—Where a client is informed that his attorney has satisfied on the record a judgment in his favor, and accepted securities for a part thereof, and does not then disavow the

attorney's act, and such attorney afterwards sues on such securities in the name and with the assent of such client, the latter cannot then repudiate the satisfaction of the judgment, and have it stricken off.—WHITESELL v. PECK, Penn., 30 Atl. Rep. 933.

67. LANDLORD AND TENANT—Oil and Gas Lease.— A lease for the sole purpose of mining for petroleum and gas, and piping the same, of "all of that certain tract of land described as follows, containing forty acres, excepting reserved therefrom ten acres," specifically described, "upon which no wells shall be drilled without consent of the party of the first part," is a grant of oil and gas well right for the whole 40 acres, with merely a limitation as to drilling wells on the ten acres.—BROWN v. SPILMAN, U. S. S. C., 15 S. C. Rep. 245.

68. LANDLORD AND TENANT—Rent.—Under a lease of premises for a boardinghouse, the measure of damages for breach of warranties as to the heating apparatus and for breach of an agreement to repair is the rental value of the rooms which cannot be let because of the lack of heat, or of their unrepaired condition.——GULLIVER v. FOWLER, Conn., 30 Atl. Rep. 852.

69. LANDLORD AND TENANT — Replevin for Attached Goods.—In replevin by a tenant, whose property has been attached for rent not yet due, there being a conflict between the amount claimed by the landlord and that tendered by the tenant, a finding that "we, the jury, find for the defendant" landlord, is insufficient, under Code, § 2521, which requires the jury to find the sum due.—GILLEYLEN v. STEWART, Miss., 16 South. Rep 495.

70. LIBEL—Words Actionable per se.—The fact that defendant published an article charging plaintiff with the commission of a felony conclusively establishes a cause of action for actual or compensatory damages. —CHILDERS v. SAN JOSE MERCURY PRINTING & PUBLISHING CO., 38 Cal., Pac. Rep. 903.

71. LIMITATIONS — Mining Claim. — The statute of limitations does not commence to run against a mining claim till the patent thereto has been issued.—CLARK v. BARNARD, Mont., 38 Pac. Rep. 834.

72. MAINTENANCE—Assignment of Cause of Action.— One who, having an interest in the subject-matter of a suit, buys up the interest of the plaintiff pending suit, and thereafter prosecutes the suit himself, is not guilty of maintenance.—ROSS v. CITY OF FT. WAYNE, U. S. C. C. of App., 64 Fed. Rep. 1006.

73. MALICIOUS PROSECUTION — Principal's Liability for Agent's Act.—Evidence that the defendant in an action for malicious prosecution employed a person to search for property he had lost, and to take all legal steps necessary for its recovery, and that such person charged plaintiff with larceny of the property, and caused his arrest, does not sustain a verdict for plaintiff.—MURREY v. KELSO, Wash., 38 Pac. Rep. 879.

74. MANDAMUS TO SCHOOL BOARD.—A school board cannot be compelled, by *mandamus*, to make a special levy for the payment of illegal orders, or other evidence of debt issued by it contrary to section 8, art. 10, of the constitution, and the laws enacted in pursuance thereof.—DEMPSEY v. BOARD OF EDUCATION OF HARDEE DISTRICT, W. Va., 20 S. E. Rep. 811.

75. MASTER AND SERVANT—Contributory Negligence. —An engineer who, to make necessary repairs, goes out on the running board of his locomotive while it is running 17 or 18 miles an hour, and while it is unusually dangerous because of the defects in the engine, when the engine and train can be stopped or the speed slackened in a short distance, is guilty of such contributory negligence as will preclude a recovery for his death, caused by being thrown from the engine.—SOUTHERN PAC. CO. v. JOHNSON, U. S. C. C. of App., 64 Fed. Rep. 951.

76. MASTER AND SERVANT — Fellow-servant.—A yard conductor, assigned to take charge of a switch in the temporary absence of the switchman, is a fellow-servant of a fireman on a locomotive.—PARKER v. NEW YORK & N. E. R. Co., R. I., 30 Atl. Rep. 849.

77. MECHANIC'S LIEN—Enforcement.—Where the purchaser of land on which there is a mechanic's lien agrees to pay off the same, and save his grantor harmless therefrom, the lien may be enforced against the land in the hands of the purchaser, without first exhausting the lenor's remedy against the grantor.—CULLERS v. FIRST NAT. BANK OF GREENVILLE, Tex., 29 S. W. Rep. 72.

78. MECHANICS' LIENS—Consent of Owner.—A contract to build, made with one holding an agreement from the owner to sell him the land on which the building was to stand on condition that he should complete it, the money being advanced for that purpose by the owner, to be repaid before the land is conveyed, imports the consent of the owner, within the meaning of Pub. St. ch. 191, § 1, requiring such consent to the performance of labor or furnishing of materials for a building in order to entitle one to a lien therefor. —BORDER v. MERCER, Mass., 39 N. E. Rep. 413.

79. MECHANICS' LIENS — Statutory Requirements.— The memorandum of a building contract, filed in the recorder's office under Code Civ. Proc. § 1183, which recites that the contract is for the erection of a two-story building, giving its dimensions, "in a workmanlike manner, in conformity with the plans, drawings, and specifications for the same" made by a certain architect, which "are to be kept and remain in the office of said architect," subject to inspection, does not sufficiently state "the general charactor of the work to be done.—BUTTERWORTH v. LEVY, 38 Cal., Pac. Rep. 897.

80. MINING LEASE — Forfeiture by Lessee.—A mining lease which provides that it shall be void if "the enterprise shall be abandoned 12 months" is avoided by the failure of the lessee to commence mining operations within 12 months after the lease commences.— WOODWORTH v. MITCHELL, 39 Ind., N. E. Rep. 437.

81. MORTGAGE. — Where a husband executes alone a deed of assignment for the benefit of his creditors of all his property, including land previously mortgaged by himself and wife, title to one-third of such land remains in the wife, subject to said mortgage.—CHASE v. VAN METER, Ind., 39 N. E. Rep. 455.

82. MORTGAGE—Sale — Notice.—Mortgaged land in the hands of a *bona fide* purchaser, without notice of a stipulation in the mortgage bond to pay attorney's fees in case of suit, is not liable for those fees, where the stipulation of the bond was not mentioned in the recorded mortgage, although the bond was "referred to" in, and "made a part" of the mortgage.—INTERSTATE BLDG. & LOAN ASS'N v. MCCARTHA, S. Car., 20 S. E. Rep. 807.

83. MUNICIPAL CORPORATION—Contract—Pleading.— A complaint on a contract for city printing which states that bids for such printing were advertised for, and that in pursuance therewith the contract in suit was entered into, sufficiently alleges the contract; it not being necessary to show that it was entered into with all the formalities required by statute.—NORTON v. CITY OF ROSLYN, Wash., 38 Pac. Rep. 878.

84. MUNICIPAL CORPORATION — Independent Contractor.—The defendant city contracted for the construction of certain sewers according to plans and specifications furnished by defendant. This work did not necessarily involve an injury to plaintiff's land. The defendant did not employ and had no power to dismiss workmen, though, by the contract, they were to be residents of the city. The superintendent of sewers and inspector, city officers, were authorized to give instructions so that certain results might be obtained, but had no control over the contractor's men: Held that, the contract being with an independent contractor, plaintiff could not recover from the defendant city for injuries caused by the negligence of the contractor's servants.—HARDING v. CITY OF BOSTON, Mass., 39 N. E. Rep. 411.

85. MUNICIPAL CORPORATION — Liability to Prosecution—Nuisance.— A borough on which is imposed the

duty of making regulations necessary for the health and cleanliness of the borough may be indicted for permitting its sewers to become a public nuisance.—COMMONWEALTH v. BREDIN, Penn., 30 Atl. Rep. 921.

86. MUNICIPAL CORPORATIONS—Ordinance.—Where a city, by ordinance, exercises the power given it by statute to regulate the distribution of natural gas, and to require those to whom the privilege of using the streets is granted to pay a reasonable license (Acts 1887, p. 36), and such ordinance authorizes the licensee to lay its mains through the streets, etc., and to take them up from time to time for changes or repairs, a clause in such ordinance which provides that the city attorney shall enforce compliance with such ordinance and all other ordinances hereafter passed does not reserve the right to such city to bind the licensee by a subsequent ordinance, which prohibits it from cutting into a certain macadamized street except on certain onerous conditions.—CITY OF INDIANAPOLIS v. CONSUMERS' GAS TRUST CO., Ind., 39 N. E. Rep. 483.

87. MUNICIPAL CORPORATIONS—Sewer Construction—Assessment.—An assessment for sewer construction under a contract which fixed the expense of part of the work by agreement between the contractor and the commissioner of public works, and not by competitive bidding, as required by Laws 1873, ch. 335, § 91, is void as to such part.—MUTUAL LIFE INS. CO. OF NEW YORK v. MAYOR, ETC., OF NEW YORK, N. Y., 39 N. E. Rep. 386.

88. MUNICIPAL IMPROVEMENTS—Delegation of Powers.—The exclusive power over street improvements conferred by the legislature on the legislative department of the various city governments cannot be delegated to any officer or committee, but must be exercised by that department itself as a body.—BOLTON v. GILLERAN, Cal., 38 Pac. Rep. 881.

89. MUTUAL BENEFIT INSURANCE—Nominal and Real Beneficiary.—Where a certificate of insurance in a mutual benefit association, made payable to a member of a firm to which insured is indebted, is intended by all parties to be for the benefit of the firm, it will, as against the heirs of the insured, be entitled to the proceeds of the certificate, though the nominal beneficiary died before the insured.—ADAMS v. GRAND LODGE OF A. O. U. W., Cal., 38 Pac. Rep. 914.

90. NEGLIGENCE—Building of Fences—Negligence.—One who, in erecting a division barbed-wire fence, lays the wire on the ground without protection, is liable to an adjoining landowner, whose stock are injured by the wire.—LOWE v. GUARD, Ind., 39 N. E. Rep. 428.

91. NEGLIGENCE — Furnishing Unsafe Team.—In an action for injuries from unsafe and unmanageable horses, it is error to charge that plaintiff was negligent in entering the carriage when she knew it dangerous to do so, where the question of the reasonable necessity of her doing so is not submitted.—SMITH v. TEAM, Miss., 16 South. Rep. 492.

92. NEGLIGENCE—Injuries—Judgment — Action Over.—The lessee of a wharf who pays a judgment recovered against him for injuries caused by the negligence of his sublessee, without negligence on his part, may recover indemnity from the sublessee of the pendency of the prior action.—OCEANIC STEAM NAV. CO. v. COMPANIA TRANSATLANTICA ESPANOLA, N. Y., 39 N. E. Rep. 360.

93. NEGLIGENCE—Injuries—Nuisance.—In an action for personal injuries received by falling into a cellar way, due to a defective cover, evidence that the cellar way had been maintained for 20 years without objection from the city authorities tends to prove that it was built under permission from the city; and therefore an instruction that it was a nuisance, *per se*, is erroneous. JORGENSEN v. SQUIRES, N. Y., 39 N. E. Rep. 373.

94. NEGOTIABLE INSTRUMENT — Accommodation Indorsement—Notice.—The fact that notes, offered for discount to a bank by another bank, its correspondent, are payable to the president of the offering bank individually, and bear his own indorsement, followed by that of the bank, affixed by him as president, is not sufficient to give notice to the discounting bank that such notes are the individual property of such president, and not of the bank, and that the bank's indorsement is for accommodation only, or to put the discounting bank on inquiry, especially when the negotiations for the discount have been carried on by letters written, in their official capacity, by the president and cashier of the offering bank.—UNITED STATES NAT. BANK OF NEW YORK v. FIRST NAT. BANK OF LITTLE ROCK, U. S. C. C. of App., 64 Fed. Rep. 985.

95. NEGOTIABLE INSTRUMENT — Note—Evidence.—On an issue as to whether a note was the mutual mistake of the parties signed in an individual, instead of a representative, capacity, the uncorroborated testimony of the four makers that it was signed individually, by mistake, will not overcome the presumption in favor of the correctness of the note, and the testimony of the two payees that there was no mistake, where the evidence of the makers consists largely of conclusions, and the testimony of the payees is positive.—BARNES v. PACKWOOD, Wash., 38 Pac. Rep. 857.

96. NEGOTIABLE INSTRUMENT — Notes.—A *bona fide* holder of a note, for value, can recover thereon, though he took it under circumstances which ought to excite the suspicion of a prudent man that the payee obtained it by fraudulent representations. — SECOND NAT. BANK v. MORGAN, Penn., 30 Atl. Rep. 957.

97. NEW TRIAL—Inadequacy of Damages.—Where, in an action for personal injuries, the jury finds, in effect, that the plaintiff has been injured through the negligence of the defendant, without any contributory negligence on his own part, and the evidence, without conflict, shows that his injuries were substantial, yet the jury awards him practically no damages at all, the verdict will be set aside and a new trial awarded.—CARTER v. WELLS, FARGO & CO., U. S. C. C. (Cal.), 64 Fed. Rep. 1005.

98. PARTNERSHIP—Parol Contract.—An oral contract between the members of a copartnership to convey firm realty from one to the other is void.—BREWER v. CROPP, Wash., 38 Pac. Rep. 866.

99. PAYMENT OF LEGACY.—When no time is fixed in the will for the payment of a legacy, it is demandable one year after the death of the testator.—ASHTON v. WILKINSON, N. J., 30 Atl. Rep. 895.

100. PAYMENT UNDER MISTAKE — Recovery.—One in whose name stock of an insolvent national bank stood, paid an assessment thereon under a threat by the receiver to sue therefor, though he claimed that he had sold the stock. More funds were collected than were required to pay the creditors of the bank: Held, that such payment could not be recovered as having been made under a mistaken belief by the payor that the whole amount would be required to pay the creditors of the bank.—HOLT v. THOMAS, Cal., 38 Pac. Rep. 891.

101. PUBLIC LAND — Certificate—Effect of Transfer.—The transfer of a land certificate already located, and upon which a patent has been issued, conveys to the grantee an equitable title to the land, if the title to the land was in the grantor at the time of transfer.—HUME v. WARE, Tex., 29 S. W. Rep. 71.

102. PUBLIC LAND—Grant by State—Navigable Waters.—The State holds the lands under the navigable or tide waters of the State as sovereign, and not as proprietary, and cannot grant them to private persons, to be by them reclaimed for private use.—COXE v. STATE, N. Y., 39 N. E. Rep. 400.

103. PUBLIC LANDS—Validity of Patent.—The issuance by the United States of a patent of government land is conclusive evidence in the State courts that the land was subject to patent.—IRVINE v. TARBAT, Cal., 38 Pac. Rep. 896.

104. RAILROAD COMPANY—Injury to Passenger.—The mere fact that an accident has occurred, by which a passenger is killed, raises no presumption of negligence, when it was conceded that the accident was

caused by the act of God.—NORFOLK & W. R. CO. v. MARSHALL'S ADM'R, Va., 20 S. E. Rep. 823.

105. REMOVAL OF CAUSES—Diverse Citizenship.—It is not necessary, to entitle a defendant, sued in a court of a State of which he is not a citizen, to remove the case to the United States Circuit Court on the ground of diverse citizenship, under the second clause of section 2, Act Cong. March 3, 1887, that all the plaintiffs should be citizens of the State in which the action is brought. —ALLEY v. EDWARD HYNES LUMBER CO., U. S. C. C. (Mich.), 64 Fed. Rep. 903.

106. REMOVAL OF CAUSES—Separable Controversy.—There is not a separable controversy, as required by the removal statute, in an assessment proceeding for municipal improvements, where the court which conducts it determines the district on which the assessment shall be laid, and therefore who shall be parties, and in a single judgment each piece of property is assessed for an amount bearing the same proportion to the full amount to be collected that its benefits bear to the full amount of benefits.—IN RE CITY OF CHICAGO, U. S. C. C. (Ill.), 64 Fed. Rep. 897.

107. RES JUDICATA.—A judgment rendered in an action is not conclusive on the parties in subsequent litigation, unless they were adversary parties in the former suit.—KOELSCH v. MIXER, Ohio, 39 N. E. Rep. 417.

108. RES JUDICATA—Railroad Companies.—Recovery by a husband for injuries to himself is not a bar to a subsequent action for injuries to his wife, sustained at the same time, as a result of the same negligence.—TEXAS & P. RY. CO. v. NELSON, Tex., 29 S. W. Rep. 78.

109. SALE—Fraud.—A plea which alleges that plaintiff's agent drew up a contract, and read it over to defendant, and, believing that the instrument was as read, defendant executed it, and which set out the difference between the instrument defendant signed and the one he meant to sign, sufficiently shows that the contract was procured by fraud.—BECK & PAULI LITHOGRAPHING CO. v. HOUPPERT, Ala., 16 South. Rep. 522.

110. SALE OF LAND—Innocent Purchasers.—Innocent purchasers for value of land from the person in whom the title stands hold it as against an undisclosed trust. —CLARK v. RAINEY, Miss., 16 South. Rep. 499.

111. TAXATION OF RAILROAD—United States Franchise. —When a railroad, which has secured a State franchise to operate its road, afterwards receives a federal franchise, the State franchise is not merged in the federal franchise, so as to prevent the taxation of the State franchise, the roadbed, etc., of the railroad.—PEOPLE v. CENTRAL PAC. R. CO., Cal., 38 Pac. Rep. 905.

112. TAXATION—Recovery of Taxes Paid.—A corporation which has paid a tax assessment upon its capital stock, levied erroneously, but within the jurisdiction of the assessing officers, and so not illegally, cannot recover the amount so paid.—UNITED STATES TRUST CO. OF NEW YORK v. MAYOR, ETC., OF CITY OF NEW YORK, N. Y., 39 N. E. Rep. 383.

113. TAXATION—Redemption.—Where land sold under a tax sale is in possession, at the expiration of the period of redemption, of one who has built a house thereon, and occupied it as a home, notice of redemption must be served upon such occupant.—PEOPLE v. WEMPLE, N. Y., 39 N. E. Rep. 397.

114. TAX TITLE.—A finding that "all steps required by law to be taken by the county auditor and treasurer and other officers had been performed by said officers" is not sufficient to sustain a tax title, where the finding is not supported by any fact found.—MATTOX v. STEPHENS, Ind., 39 N. E. Rep. 460.

115. TELEGRAPH COMPANY — Delay. — A stipulation, printed on a telegram, that the company will not be liable for damages if the claim therefor is not presented within a certain time, is a condition subsequent, which need not be pleaded in the complaint, but is a matter of defense.—WESTERN UNION TEL. CO. v. PINER, Tex., 29 S. W. Rep. 66.

116. TENDER — What Constitutes.— It is not necessary to constitute a legal tender, that the identical money tendered was kept and brought into court.— THOMPSON v. LYON, W. Va., 20 S. E. Rep. 812.

117. TRIAL—General and Special Verdict.—Where, in an action for malpractice, the jury renders a general verdict for plaintiff, the fact that it finds, in answer to special interrogatories, that plaintiff did not give defendant a fair opportunity to cure her, does not authorize the court to render judgment for defendant, the jury also having found that defendant was negligent.—BEDFORD v. SPILLMAN, Ind., 39 N. E. Rep. 427.

118. TRUST — Purchase with Embezzled Funds. — Where an employee takes money and property of his employer, without being entitled to treat it as his own, and uses it to buy a lot and build a house thereon, a resulting trust will be declared in favor of the employer.—GROUCH v. HAZLEHURST LUMBER CO., Miss., 16 South. Rep. 496.

119. TRUST AND TRUSTEE — Loss of Trust Fund.—A trustee who has once actually received the funds of the trust estate cannot discharge himself from accounting for the same to the *cestui que trust* by showing that they were lost by his own neglect. In such case a suit against him by his *cestui que trust* to recover the estate is not based upon his neglect, but upon his actual receipt of the estate; and the case is not varied if the suit be against the devisee of the delinquent trustee.—LINDSLEY v. DODD, N. J., 30 Atl. Rep. 897.

120. USURY—Defense.—Where the grantees of land give a note signed by all, and secured by a mortgage on the land, for the price, and one of the grantees purchases the interest of the others in the land, he may, in an action to foreclose the mortgage, plead the defense of usury to the full extent of the note, and not merely to the extent of his original interest in the land.—PEOPLE'S BANK v. JACKSON, S. Car., 20 S. E. Rep. 786.

121. WATERS—Impeachment—Character.—A witness' general moral character cannot be impeached by evidence of particular acts of immorality.—GRIFFITH v. STATE, Ind., 39 N. E. Rep. 440.

122. WATERS — Streams on Public Land—Appropriation for Mining Purposes.—In localities where rights by prior appropriation of the streams on public lands for mining and irrigating purposes became lawful through the acquiescence of the government and the customs of the locality, the common law rights of riparian owners were modified to the extent of the rights so acquired.—ISAACS v. BARBER, Wash., 38 Pac. Rep. 871.

123. WILL — Nature of Estate.—Testator devised land and personalty to trustees, to pay the net income to his daughter G during her life, and after her death on trust for all the daughter's children equally and absolutely: Held that, on the death of the daughter, the trust, being no longer an active one, ceases, and the estate vests absolutely in the children.—FELGNER v. HOOPER, Md., 30 Atl. Rep. 911.

124. WILLS—Parol Evidence.—Testator made a will bequeathing sums of money to certain persons, but made no disposition of his residuary estate, nor any provision for the payment of the legacies: Held, that parol evidence that testator made the will two days before his death, and that he had then no personal property, is not admissible to show his intention to charge the payment of the legacies on his land.— MCGOUGH v. HUGHES, R. I., 30 Atl. Rep. 851.

125. WILL—Powers—Perpetuities.—A testator gave a life estate to his daughter, with power to appoint it thereafter to her child or children, "or his, her, or their descendant or descendants." The daughter, by will, appointed the estate to her son for life, with remainder to his "children and descendants *per stirpes*, who are living at his death:" Held, that the remainder being contingent on the death of the son, the appointment to his children then living was a valid exercise of the power.—HILLEN v. ISELIN, N. Y., 39 N. E. Rep. 368.